

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

-----X  
**UNITED STATES OF AMERICA,**

Plaintiff,

-against-

**98 CR 1101 (ILG)**

**FILED UNDER SEAL**

**FELIX SATER,**

Defendant.  
-----X

**DECLARATION OF KELLY MOORE**

**KELLY MOORE** declares as follows:

1. I am member of the Bar of this Court and am a member of the law firm of Morgan, Lewis & Bockius LLP, 101 Park Avenue, New York, New York, 10178, counsel for Felix Sater.

2. I make this declaration in support of Mr. Sater's application to this Court to (i) order the immediate return of certain confidential materials, much of which were previously sealed by this Court in connection with criminal proceedings before this Court; and (ii) conduct an inquiry into how certain persons acquired the materials and to whom the materials were distributed in order to ensure that all such materials are returned or destroyed.

**Background**

3. Mr. Sater was the subject of criminal proceedings before this Court, which concluded on October 23, 2009, index number 98 CR 1101 (ILG) (the "Criminal Proceedings").

4. This Court sealed the docket and filings in the Criminal Proceedings.

5. In connection with the Criminal Proceedings, certain confidential materials were sealed including:

- a Cooperation Agreement dated December 10, 1998;
  - A United States Department of Justice Financial Statement dated December 10, 1998; and
  - a Pre-sentence Investigation Report dated June 18, 2004 (the “2004 PSR”);
- (together, the “Sealed Materials”).

6. In addition, Mr. Sater and the United States Attorney’s Office entered into a confidential Proffer Agreement dated October 2, 1998 (together with the Sealed Materials, the “Sealed and Confidential Materials”).

7. The confidential nature of the Sealed and Confidential Materials is plain. For example, the 2004 PSR states: “It is the policy of the federal judiciary and the Department of Justice that further redisclosure of the pre-sentence report is prohibited without the consent of the sentencing judge.”

8. Mr. Sater was formerly affiliated with a real estate development firm known as Bayrock Group LLC (“Bayrock” and together with its subsidiaries, the “Bayrock entities”).

9. Mr. Sater has informed us that, while he was associated with Bayrock, he kept the Sealed and Confidential Materials in a personal file in his Bayrock office.

**The Delaware Court Dismissed an Action Filed by  
Mr. Kriss and His Attorney, Fred Oberlander**

10. Jody Kriss is a former employee of Bayrock.

11. During the course of his employment, Mr. Kriss maintained an office adjacent to Mr. Sater's. As noted above, Mr. Sater kept the Sealed and Confidential Materials in a personal file in his Bayrock office.

12. Mr. Kriss was employed by Bayrock from 2003 to 2007 as Director of Finance. In 2007, he took a leave of absence. He returned from leave for a brief period in 2008 and then was terminated by the Company.

13. In or around 2009, Mr. Kriss commenced an action in the Delaware Chancery Court against, inter alia, Mr. Sater, certain Bayrock entities and certain employees of Bayrock entities (the "Delaware Action").

14. In the Delaware Action, Mr. Kriss was represented by several attorneys including Mr. Fred Oberlander.

15. In the Delaware Action, Mr. Kriss alleged, inter alia, that the Bayrock entities constituted a racketeer influence and corrupt organization (RICO), that tax laws had been violated, and that Mr. Kriss – who was the Director of Finance at the time of the alleged violations – had been denied certain economic benefits to which he was entitled based on his association with Bayrock.

16. Chancellor Strine dismissed the Delaware Action, finding, inter alia, that Mr. Kriss's disputes with Bayrock and the other defendants are the subject of an arbitration agreement.

17. By order dated February 19, 2010, the Delaware court directed Mr. Kriss to file an arbitration and, in the event the arbitrator determined that the claims were

not arbitral, to file an action in court in New York. A copy of the order and the hearing transcript are attached as Exhibit 1.

**Attorney Oberlander's Other Client  
Admits Taking Emails and Documents  
From Bayrock**

18. In addition to the Delaware Action, another former employee of Bayrock, Joshua Bernstein, commenced an arbitration against Bayrock.

19. In that action, Mr. Bernstein testified that, during the course of his employment, he downloaded files from the computers and servers of Bayrock and installed monitoring software which allowed him access to other Bayrock personnel's computers. (See Ex. 2, Bernstein Deposition at 194-233).

20. Mr. Bernstein further testified that when he left Bayrock, he took "thousands" of emails and hundreds of documents (*Id.*)

21. Mr. Oberlander represents Mr. Bernstein.

**Messrs. Kriss and Oberlander File  
a New Action in the SDNY, Using the  
Sealed and Confidential Materials**

22. On Wednesday, May 12, 2010, Mr. Oberlander emailed to Ronald Kriss—a partner at the law firm Akerman Senterfitt and father of Jody Kriss—a draft complaint (the "SDNY Complaint") on behalf of Jody Kriss and another former Bayrock employee against Mr. Sater, Bayrock entities and numerous others.

23. The SDNY Complaint is similar in nature to the Delaware Action.

24. The SDNY Complaint references and attaches as exhibits thereto the Sealed and Confidential Materials.

25. In addition, the SDNY Complaint quotes numerous privileged communications between Bayrock and its counsel.

26. Mr. Oberlander's email to Ron Kriss stated as followed:

**From:** fred55@aol.com [mailto:fred55@aol.com]  
**Sent:** Wednesday, May 12, 2010 12:33 PM  
**To:** Kriss, Ronald (Sh-Mia); Kriss, Ronald (Sh-Mia)  
**Subject:** Fwd: complaint, sdny, salomon, weinrich, & salomon & co.  
Ron --

I recommend you forward this to Julius with the comment from me that there are three alternatives here:

- (a) I file publicly today.
- (b) I file under seal today.
- (c) He arrange a tolling agreement with EVERY defendant but nixon peabody.

I don't care how many people he has to get on the phone and how fast he has to work. He had years to give back the money and now it's over. He can get Brian Halberg to help him.

I believe it's possible to get this in under seal if Bayrock joins in a joint motion in part 1 to seal the complaint pending a redaction agreement with the assigned judge but there are never any guarantees.

Thanks,

FMO

A copy of this email is attached as Exhibit 3.

27. The "Julius" referenced in the above email is Julius Schwarz, an officer of Bayrock.

28. The above email, together with the draft SDNY Complaint and the exhibits thereto, were distributed by Ronald Kriss to Mr. Schwarz in the SDNY action. A copy was forwarded to Mr. Sater. We do not know how many times Mr. Oberlander's email was forwarded with the attachments.

29. On Thursday, May 13, 2010, Mr. Oberlander filed the SDNY Complaint in the Southern District of New York, and the matter was assigned to the Hon. Naomi Reice Buchwald.

30. The SDNY Complaint was made available to the public for download through a paid online news service, "Courthouse News." We do not know how many people downloaded the SDNY Complaint from Courthouse News.

31. Later that day, upon learning of the filing, my partner, Brian Herman, and I called Mr. Oberlander to demand that the Sealed and Confidential Materials be withdrawn and returned.

32. Mr. Oberlander informed us that he had retained his own counsel, an attorney named David Lewis, to address his disclosure of the Sealed and Confidential Materials.

33. Mr. Lewis refused to disclose how his client, Mr. Oberlander, had obtained the Sealed and Confidential Materials and refused to return the Sealed and Confidential Materials.

34. Mr. Lewis also stated that Mr. Oberlander had made an unsuccessful application to have the Materials filed under seal in the Southern District, and that he was amenable to a joint application to Judge Buchwald.

35. Mr. Lewis, Mr. Herman and I subsequently spoke with Judge Buchwald on May 13, and Judge Buchwald immediately issued an order preventing further dissemination of the SDNY Complaint, the exhibits thereto and the information therein (the "First Order"). (Exhibit 4). Judge Buchwald indicated during the telephone

conference that any application for return of the Sealed and Confidential Materials or inquiry into the disclosure should be directed to this Court.

36. On information and belief, a copy of the First Order was sent by Mr. Oberlander to each person to whom he had previously sent the SDNY Complaint. However, we do not know whether the SDNY Complaint and the exhibits were distributed further.

37. On May 14, 2010, at the request of Morgan Lewis, Courthouse News removed the SDNY Complaint from its website and sent a copy of the First Order to each person who had downloaded the SDNY Complaint.

38. On May 14, 2010, Judge Buchwald issued a second order (the "Second Order") sealing the SDNY Complaint in its entirety pending further order of the Court. (Exhibit 5). Judge Buchwald further ordered that a redacted version of the original complaint, redacting any sealed documents or references to sealed documents, be filed by May 19, 2010.

39. On May 17, 2010, Courthouse News ran a news story disclosing information from the SDNY Complaint. At the request of Morgan Lewis, the story was taken down, but we do not know how many people read the story while it was still posted.

#### **Mr. Sater Seeks Relief**


40. To summarize:

- Mr. Oberlander and one or more of his clients are in possession of the Sealed and Confidential Materials;

- Mr. Oberlander refuses to disclose how he obtained the Sealed and Confidential Materials and refuses to return them;
- Mr. Oberlander, aware of the confidential nature of the documents, has distributed the Sealed and Confidential Materials and the SDNY Complaint referencing the Sealed and Confidential Materials, and the recipients may have further distributed that information;
- As a direct result of Mr. Oberlander's actions, the SDNY Complaint referencing the Sealed and Confidential Materials was posted for download to the public and was used as the basis for a news article.

41. Based on the foregoing, we respectfully request that this Court issue an order requiring Mr. Oberlander, his clients and anyone else who has received the Sealed and Confidential Materials or documents referencing the Sealed and Confidential Materials to immediately return all copies to Mr. Sater. Further, in order to fully effectuate relief, we ask that the Court conduct a hearing to determine how this disclosure occurred and the extent to which the Sealed and Confidential Materials were disseminated.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on May 18, 2010.

  
Kelly Moore





COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

LEO E. STRINE, JR.  
VICE CHANCELLOR

New Castle County Courthouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

February 19, 2010

Stamatios Stamoulis, Esquire  
Stamoulis & Weinblatt LLC  
Two Fox Point Centre  
6 Denny Road, Suite 307  
Wilmington, DE 19809

Kathaleen St. J. McCormick, Esquire  
Young Conaway Stargatt & Taylor, LLP  
The Brandywine Building  
1000 West Street, 17<sup>th</sup> Floor  
Wilmington, DE 19801

John A. Elzufon, Esquire  
Elzufon, Austin, Reardon  
Tarlov & Mondell, P.A.  
300 Delaware Avenue  
Wilmington, DE 19801

RE: *Jody Kriss v. Bayrock Group, LLC, et al.*  
C.A. No. 4154-VCS

Dear Counsel:

To my chagrin, I realized that the final order in this case was never entered. No one brought to my attention this omission. The order had been finalized but not entered some months ago. Here it is. I regret the delay. In future, if a delay of this ever occurs and it actually worries you, please contact my chambers. I do not like to create delay and this was an error of omission in filing, as the order had been finalized by me in late September.

Very truly yours,

*/s/ Leo E. Strine, Jr.*

Vice Chancellor

LESJr/eb

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JODY KRISS, for himself and derivatively on behalf of the  
Delaware limited liability companies Bayrock Spring Street  
LLC, and Bayrock Whitestone LLC, the Arizona limited liability  
company Bayrock Camelback LLC, the Florida limited liability  
companies Bayrock Merrimac LLC, and Bayrock Ocean Club  
LLC, and the New York limited liability company Bayrock  
Group LLC,

Plaintiff,

v.

BAYROCK GROUP LLC; RIF INTERNATIONAL GROUP,  
INC.; TEVFIK ARIF; JULIUS SCHWARZ; MEL DOGAN;  
DOGAN & ASSOCIATES; 2027 EMMON AVE LLC; FELIX  
SATTER (aka FELIX SATER); VICTORIA SATER; ALEX  
SALOMON; ALEX SALOMON & CO., PC; JOSEPH  
BENCIVENGA; BUENA VISTA ALARGA LLC; BAYROCK  
SPRING STREET LLC; BAYROCK WHITESTONE LLC;  
BAYROCK HOLDINGS LLC; BAYROCK NATURAL  
STONE LLC; BAYROCK SAPIR ORGANIZATION LLC; 246  
SPRING STREET HOLDINGS II LLC; BAYROCK/SAPIR  
ORGANIZATION HOLDINGS LLC; BAYROCK/SAPIR  
ORGANIZATION REALTY LLC; 151-45 SIXTH ROAD  
WHITESTONE PARTNERS LLC; CAMELBACK  
DEVELOPMENT PARTNERS LLC; STILLMAN BAYROCK  
MERRIMAC LLC; SB HOTEL ASSOCIATES LLC; 550  
SEABREEZE DEVELOPMENT LLC,

True Defendants,

And

BAYROCK GROUP LLC; BAYROCK WHITESTONE LLC;  
BAYROCK CAMELBACK LLC; BAYROCK MERRIMAC  
LLC; BAYROCK OCEAN CLUB LLC; BAYROCK SPRING  
STREET LLC,

Nominal Defendants.

C.A. No.:  
4154-VCS

**FINAL ORDER**

IT IS HEREBY ORDERED, this 19<sup>th</sup> day of February, 2010 for the reasons set  
forth in the September 16, 2009 bench ruling of the Court, that:

1. As to all Defendants, all claims pled in the Complaint are dismissed without prejudice for lack of subject matter jurisdiction, pursuant to Court of Chancery Rule 12(b)(1).
2. As to all Non-Resident Defendants named in the Complaint as defined in the Bayrock Defendants' Opening Brief, all claims pled in the Complaint are dismissed without prejudice for lack of personal jurisdiction, pursuant to Court of Chancery Rule 12(b)(2).
3. As to the Resident Defendants named in the Complaint as defined in the Bayrock Defendants' Opening Brief, all claims pled in the Complaint are dismissed without prejudice for failure to join indispensable parties, pursuant to Rule 12(b)(7).

Plaintiff's Complaint is dismissed without prejudice, as opposed to with prejudice, solely so that the doctrine of *res judicata* does not preclude Plaintiff the opportunity to bring his claims before an arbitrator or, if certain claims are held not to be arbitrable, in a forum, such as the New York state courts, which can appropriately exercise jurisdiction over all Defendants and which is convenient. Of course, the reasons for dismissing this Complaint will retain their force into the future, and therefore an attempt by Plaintiff to bring these claims again in this Court will result in dismissal for the same reasons stated in the Court's bench ruling and which are summarized in this order.

/s/ Leo E. Strine, Jr.  
Vice Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JODY KRISS, for himself and :  
derivatively on behalf of the Delaware :  
limited liability companies Bayrock :  
Spring Street LLC and Bayrock :  
Whitestone LLC, the Arizona limited :  
liability company Bayrock Camelback :  
LLC, the Florida limited liability :  
companies Bayrock Merrimac LLC and :  
Bayrock Ocean Club LLC, and the New :  
York limited liability company Bayrock :  
Group, LLC, :

Plaintiff, :

v :

Civil Action  
No. 4154-VCS

BAYROCK GROUP LLC; RIF INTERNATIONAL :  
GROUP, INC.; TEVFIK ARIF; JULIUS :  
SCHWARZ; MEL DOGAN; DOGAN & ASSOCIATES; :  
2027 EMMONS AVE LLC; FELIX SATTER :  
(a/k/a FELIX SATER); VICTORIA SATER; :  
ALEX SALOMON; ALEX SALOMON & CO, PC; :  
JOSEPH BENCIVENGA; BUENA VISTA ALARGA :  
LLC; BAYROCK SPRING STREET LLC; BAYROCK :  
WHITESTONE LLC; BAYROCK HOLDINGS LLC; :  
BAYROCK NATURAL STONE LLC; BAYROCK :  
SAPIR ORGANIZATION LLC; 246 SPRING :  
STREET HOLDINGS II LLC; BAYROCK/SAPIR :  
ORGANIZATION HOLDINGS LLC; BAYROCK/ :  
SAPIR ORGANIZATION REALTY LLC; 151-45 :  
SIXTH ROAD WHITESTONE PARTNERS LLC; :  
CAMELBACK DEVELOPMENT PARTNERS LLC; :  
STILLMAN BAYROCK MERRIMAC LLC; SB HOTEL :  
ASOCIATES LLC; 550 SEABREEZE :  
DEVELOPMENT LLC, :

True Defendants, :

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CHANCERY COURT REPORTERS  
New Castle County Courthouse  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801-3768  
(302) 255-0524

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1 THE COURT: Good morning, everyone.

2 ALL COUNSEL: Good morning, Your

3 Honor.

4 THE COURT: You may proceed.

5 MS. McCORMICK: Good morning, Your

6 Honor.

7 THE COURT: Good morning.

8 MS. McCORMICK: My name is Katie

9 McCormick. I'm an attorney with Young, Conaway,

10 Stargatt & Taylor. I'm joined today with my

11 colleague, Barry Willoughby. We represent a subset of

12 defendants in this action who we have referred to in

13 prior filings as the Bayrock defendants. Today, to

14 make it easier on myself, I will refer to these

15 defendants simply as defendants. So we do not argue

16 on behalf of all defendants in this action.

17 THE COURT: Who are you not arguing

18 on?

19 MS. McCORMICK: We are not arguing on

20 behalf of Mr. Salomon, the accountant; Mr. Salomon's

21 firm or Mr. Salomon's former employee, Mr. Bencivenga.

22 THE COURT: Does he have counsel?

23 MS. McCORMICK: He does.

24 MR. ELZUFON: He does, Your Honor. I

1 represent all three.

2 THE COURT: Did anyone move on his  
3 behalf?

4 MR. ELZUFON: Your Honor, there's a  
5 pleading filed on May 18th which gives my clients the  
6 right to answer or otherwise respond 30 days after the  
7 amended complaint was filed, because we've been  
8 advised all along there's an amended complaint  
9 forthcoming. I don't know what docket sheet it is in  
10 the Court, but it was e-filed on May 18th, and I have  
11 it right here.

12 THE COURT: Okay.

13 MR. ELZUFON: Thank you, Your Honor.

14 MS. McCORMICK: Thank you, Your Honor.

15 We're here today arguing defendants'  
16 motion to dismiss. Defendants were all engaged in  
17 real estate development through subsidiaries managed  
18 by defendant Bayrock Group LLC, a New York-based  
19 limited liability company. Mr. Arif, a defendant in  
20 this action, a Turkish citizen and a New York  
21 resident, is the managing member of Bayrock Group.  
22 Many of the Bayrock Group subsidiaries are listed as  
23 defendants to this action, and nine of those 18  
24 subsidiaries are not Delaware entities.



1           Through his complaint Mr. Kriss seeks  
2 to enforce a November 10th employment agreement, which  
3 we'll refer to today as the November 10th contract, in  
4 which he was promised certain membership interests in  
5 certain subsidiaries of the Bayrock Group. This  
6 contract defines those entities as the company  
7 entities. The contract, however, does not catalogue  
8 these company entities. Various defendants have been  
9 named in this suit by virtue of the plaintiff's claim  
10 that they are, in fact, company entities under the  
11 agreement. We dispute this.

12           Mr. Kriss' claim ultimately boils down  
13 to whether Mr. Kriss is entitled to any moneys from  
14 any of these real estate entities and, if so, how  
15 much, if any at all. This question cannot be resolved  
16 without turning to the November 10th contract which  
17 governs when Mr. Kriss' membership interests, if any,  
18 would vest and to what, if any, moneys in the form of  
19 advancements or distributions Mr. Kriss would  
20 ultimately be entitled.

21           This contract, which was negotiated in  
22 New York and contains a New York choice-of-law  
23 provision, contains a binding arbitration clause.  
24 This makes sense, given that the uncatalogued entities

1 it was likely to affect were incorporated in a  
2 multitude of different states. Because the key  
3 question in this case is whether Mr. Kriss will be  
4 entitled to any moneys from any of the defendant  
5 entities, because this question cannot be resolved  
6 without turning to the substantive terms of the  
7 November 10th contract and because the  
8 November 10th contract contains a binding arbitration  
9 clause, this Court lacks jurisdiction over this  
10 dispute, and the case should be dismissed.

11 But even absent the arbitration  
12 clause, this dispute could not be entirely resolved in  
13 Delaware, because this Court lacks jurisdiction over  
14 20 of the 29 defendants and because many of those  
15 defendants, including, at the very least, Mr. Arif and  
16 the Bayrock Group, both of whom are signatories to the  
17 November 10th contract are indispensable to this  
18 action. For these reasons, the case should be  
19 dismissed.

20 Defendants specifically have made  
21 three arguments in support of dismissal. First, the  
22 November 10th contract giving rise to plaintiff's  
23 claims contains a binding arbitration clause which  
24 should be enforced and which deprives this Court of

1 subject matter jurisdiction over this action. Because  
2 the clear and unambiguous language of this clause  
3 delegates the question of substantive arbitrability to  
4 an arbitrator, we submit that this Court need not  
5 consider whether plaintiff's claims are within the  
6 scope of the arbitration clause at issue in order to  
7 dismiss the action.

8 THE COURT: So we leave it to the  
9 arbitrator.

10 MS. McCORMICK: Correct. In any  
11 event, the claims are, in fact, within the scope of  
12 the arbitration clause. And were this Court to  
13 undertake the analysis, it would result in our favor.

14 THE COURT: What were your discussions  
15 with the other side about this amended complaint? Why  
16 did they not bring it forward, is your understanding?

17 MS. McCORMICK: I have no  
18 understanding as to why they haven't filed an amended  
19 complaint, Your Honor. It's, frankly, confusing to  
20 us.

21 Second, this Court -- second, this  
22 Court lacks personal jurisdiction over 20 of the 29  
23 defendants in this action. Plaintiff bears the burden  
24 of establishing a prima facie case for the exercise of

1 Group under Section 18-109 of the LLC long-arm  
2 statute -- or LLC implied consent statute. We don't  
3 think the act in itself is enough to establish  
4 jurisdiction over the Bayrock Group or Mr. Arif. And  
5 we don't think the allegations are specific enough to  
6 support that claim.

7 THE COURT: Okay. Do you have  
8 anything else to add at this time?

9 MS. McCORMICK: I can continue, Your  
10 Honor. Our third argument is based on the fact that  
11 this Court lacks personal jurisdiction over  
12 indispensable parties to this action, specifically at  
13 the very least Mr. Arif and the Bayrock Group, but  
14 also the company entities who plaintiffs contend are  
15 signatories to the contract. We don't agree with this  
16 assertion, but -- especially with respect to the  
17 specific defendant entities; but because it's  
18 plaintiff's contention and this motion is based on the  
19 allegations in plaintiff's complaint, we don't think  
20 that plaintiff can move forward without these  
21 indispensable parties.

22 THE COURT: Okay.

23 MS. McCORMICK: Should I proceed on  
24 the factual background, Your Honor?

1 THE COURT: No. I'm good with that.  
2 That's fine. Thank you. Let me hear from the other  
3 side.

4 MS. MCCORMICK: Thank you.

5 MR. STAMOULIS: Good morning, Your  
6 Honor. Stam Stamoulis on behalf of Jody Kriss. I'd  
7 just like to introduce our side. First with me is  
8 Jody Kriss, the plaintiff in this matter; our New York  
9 counsel, Fred Oberlander, and my partner Rich  
10 Weinblatt.

11 THE COURT: Good morning.

12 MR. STAMOULIS: Now, Mr. Oberlander  
13 will address the merits of arbitrability and the  
14 employment contract and where our claim is coming  
15 from. I just wanted to give the Court a brief bit of  
16 background of who Mr. Kriss is and why we're here.

17 THE COURT: No, I don't need --

18 MR. STAMOULIS: No?

19 THE COURT: -- splitting an argument.  
20 This is a motion to dismiss. Either handle it  
21 yourself or have Mr. Oberlander handle it.

22 MR. STAMOULIS: Okay.

23 THE COURT: And I don't want to hear  
24 facts not in the complaint.

1 MR. OBERLANDER: All right.

2 THE COURT: So I don't want to hear a  
3 history of the world. This is a motion to dismiss.

4 For example, why was the motion -- why  
5 is the amended complaint not on file?

6 MR. OBERLANDER: The amended complaint  
7 is not on file because our prior -- my prior local  
8 counsel in Delaware specifically advised me when I  
9 said to him during its preparation "I think we need to  
10 file a books and records before we do an amended  
11 complaint because it will be full of derivative  
12 complaints." And I understand from reading Your  
13 Honor's transcript in a Bank of America hearing this  
14 would be a very advisable thing to do. And counsel,  
15 prior counsel wrote back in an e-mail and said it  
16 would just be very foolish. Just rely on discovery  
17 and go ahead and plead. He subsequently filed a  
18 request to leave the case a week later for  
19 irreconcilable differences, of which that was one; and  
20 within 30 days I replaced him with these gentlemen.  
21 And they've been working on the case for 75 days.

22 We have produced a great deal of  
23 documents that have been filed. As to the specific  
24 question of why the moment they came in we couldn't

1 file an amended complaint, it was their suggestion.  
2 And the draft form of the amended complaint is quite  
3 complex and very serious and implicates very many  
4 serious charges against also new defendants who are  
5 not before the Court and shouldn't be mentioned here,  
6 that they said "No. You know what. We will argue the  
7 motion to dismiss but make clear that we do want you  
8 to file an amended complaint; No. 2, that the claims  
9 in the amended" -- wait, wait --

10 THE COURT: No.

11 MR. OBERLANDER: He wanted a books and  
12 records demand. So we did a books and records instead  
13 of --

14 THE COURT: Okay. Let me advise you  
15 all. You did exactly what the rule -- you stood on  
16 what you did and you will live on what you did. Books  
17 and records -- what people are admonished to do is to  
18 seek books and records before they file litigation.  
19 You can't file an initial complaint, then use books  
20 and records to get discovery.

21 So you've got a complaint before me.  
22 You chose to stand on it. Stand on it. If you've got  
23 issues with yourself and your legal judgment and those  
24 of your Delaware counsel or prior Delaware counsel,

1 that's all in your sacred sweat lodge on your side of  
2 the equation. I don't want to hear about it, okay?  
3 You had an opportunity in response to this to file an  
4 amended complaint. You did not. So let's focus on  
5 what's in your complaint.

6 MR. OBERLANDER: All right. But just  
7 for the record, I wasn't intending to use books and  
8 records as discovery. Books -- I just wanted to be  
9 clear. Books and records -- since it's filed and been  
10 in front of you already, just for books and records  
11 runs to the new charges and a new complaint that --

12 THE COURT: But the point is, once  
13 you're in litigation, if you want information for an  
14 amendment, you need to either get it through discovery  
15 or you need to plead and plead the gateway. That is  
16 the way it works. It's a sequential thing. What  
17 people who are stockholders are encouraged to do is  
18 use their books and records right before they file a  
19 litigation. Once you file a litigation, you can't go  
20 around under 220 or an LLC statute equivalent and seek  
21 stuff to buttress your complaint. And Rule 15(aaa) is  
22 clear. It's emphatically clear.

23 MR. OBERLANDER: It was my  
24 understanding that Rule 15(aaa) says that once they



1 file a responsive pleading, you no longer have the  
2 right to amend. You have to petition for leave to  
3 amend. Or is that 15(aa), if you forgive me? But  
4 that --

5 THE COURT: No. What 15(aaa) clearly  
6 says is if you want to defeat a motion to dismiss,  
7 you're supposed to bring forward your amendment.

8 MR. OBERLANDER: Granted, if you --

9 THE COURT: If you wish to defeat --

10 MR. OBERLANDER: If you wish to defeat  
11 it by an amendment.

12 THE COURT: By an amendment.

13 MR. OBERLANDER: Yes.

14 THE COURT: So you don't have your  
15 amendment. So you're standing on your complaint.

16 MR. OBERLANDER: All right. As to  
17 personal jurisdiction and conspiracy theory, all  
18 right, the -- there has been an affidavit filed in  
19 connection with the reply brief alleging acts  
20 occurring both in 2005 and 2007 which support  
21 conspiracy jurisdiction. And once conspiracy  
22 jurisdiction is established over all of the named  
23 defendants, then while they may or may not be  
24 necessary, none of them can be indispensable, because

1 by definition they would all be subject to  
2 jurisdiction.

3 THE COURT: Where in the complaint  
4 is -- your -- your pleading in your complaint is that  
5 from the get-go no one intended to honor this  
6 contract; right?

7 MR. OBERLANDER: No. I'm sorry. I  
8 was going to get to that. What my --

9 THE COURT: So that's not in your  
10 complaint. So I -- I didn't read --

11 MR. OBERLANDER: The way you phrased  
12 it, I would have to say no. I'm not being  
13 pettifogging here. The way you phrased it, I would  
14 disagree. That isn't my complaint. I'm -- I --

15 THE COURT: Okay. Paragraph 57. "at  
16 the time of their execution of that contract" -- this  
17 would be the November 10 contract -- "each and every  
18 one of ... the Company; and ... the Company Entities;  
19 had a secret intention never to honor those  
20 obligations."

21 MR. OBERLANDER: But -- but, Your  
22 Honor, in the entire context of a complaint, I don't  
23 believe -- I won't argue that it couldn't have be  
24 written more clearly, but the complaint does state --

1 and I can state you the paragraph numbers to support  
2 the following: Here's what -- here's how that  
3 complaint is structured.

4 THE COURT: Paragraph 71: "Secretly  
5 (and therefore unknown to Kriss), each and every one  
6 of the sellers never intended to honor the rights  
7 conveyed to Kriss by those securities ...."

8 MR. OBERLANDER: Absolutely. But what  
9 we're -- but there's a huge distinction here, a very  
10 big distinction that -- that counsel for defendants  
11 has glossed over, which is that there are -- to make  
12 it simple, there are two separate contracts at issue  
13 here. There are actually 19 of them, but let's just  
14 take two, one from the group of 18 and that agreement.

15 What we have here is the equivalent of  
16 a TowerHill situation whereby --

17 THE COURT: Will you stick to this  
18 case and stick to your complaint?

19 MR. OBERLANDER: The complaint says  
20 that we signed the contract -- my client signed the  
21 contract with them in which they said "We are now  
22 giving you membership interests in 18 limited" --  
23 well, "in all the limited liability companies known as  
24 the company entities. We're giving you right now

1 membership interest in them."

2           The complaint then says we're suing  
3 those companies issuing those interests because some  
4 of those companies absolutely did issue the interest  
5 but intended, after issuing them, never to honor the  
6 obligations conveyed by those interests. And the  
7 obligations conveyed by those interests are running  
8 through the limited liability company agreements of  
9 those companies.

10           What we have here is Mr. Kriss signed  
11 a subscription agreement, except he provided services  
12 instead of money; but in return for that he was given  
13 stock in some number of company entities. Out of that  
14 number a subset -- it was completely effective. He  
15 got the stock, but we claim that the companies giving  
16 him the stock intended never to honor the dividend  
17 rights. Now, since it's an LLC, we'll say they gave  
18 him membership interests, intending never to honor any  
19 of the rights and obligations, including  
20 distributions, but it would be the same concept.

21           So what that complaint doesn't say,  
22 when Bayrock, the parent company, entered into this  
23 contract, it had a secret conspiracy with its managers  
24 and with its 18 controlled subsidiary-related

1 companies. And pursuant to that conspiracy, it would  
2 cause all 18 of them to issue stock to him, but the 18  
3 of them would then -- excuse me; membership interest,  
4 but the 18 would then, although he would now be bound  
5 by their limited liability company agreements, the 18  
6 of them would never honor them.

7 Now, at the time we assumed, because  
8 of evidence that we would produce at trial, we assumed  
9 that some of the 18, they legally ineffectively  
10 couldn't actually make the transfer of interest  
11 because they didn't have the power and some they did.  
12 That complaint has been misrepresented.

13 Counsel in their opening brief in  
14 support of the motion to dismiss says that we have  
15 alleged in paragraph 39 that the document -- that the  
16 November 10th subscription agreement, employment  
17 agreement, ~~call it what you will~~, they say that in  
18 paragraph 39 we claim it was legally ineffective as to  
19 convey membership interests in any of the other  
20 companies. That is absolutely not the case.

21 What happened is, I was advised we  
22 cannot do fictitious pleading in Delaware. So  
23 paragraph 39 of that complaint says that there is a  
24 group of companies, a subset of company entities --

1 and we will call that subset Class A. As to those,  
2 they had no power to convey the membership interests  
3 and, therefore, perpetrated a fraud, and those  
4 companies participated in the fraud along with  
5 Bayrock.

6 As to all the other companies not in  
7 Class A, they had the right, did give him -- and if  
8 you look at paragraphs 108 and 110, I believe, you  
9 will see that we affirmatively allege as to Bayrock  
10 Whitestone and as to Bayrock Spring Street that he was  
11 instantly made a member of them. And that's why there  
12 are derivative pleadings based on them.

13 So when Your Honor said to me are we  
14 basically saying the November 10th contract was  
15 intended not to be honored, the answer is absolutely  
16 not. Not only that, we are simply -- everything we  
17 are doing in this Court -- that we intend to do in  
18 this Court and that we want to do in this Court  
19 relates to claims of breaches of the limited liability  
20 company agreements and not of that November 10th  
21 contract. That's why I cite to Parfi, to TowerHill,  
22 to all of the cases involving dueling contracts.

23 This case is about -- and secondly --  
24 if you will forgive me, let me backtrack. Secondly,

1 counsel for defendant has said that we are making a  
2 claim for distributions we didn't get. I'd appreciate  
3 counsel showing me where in that complaint it is,  
4 because under no circumstances does that complaint say  
5 anything about distributions that he should have  
6 gotten and didn't get. We didn't make that complaint  
7 in that -- there's no claim for such a thing in there.

8 THE COURT: Well, you say -- what do  
9 you mean by "cheated out of millions of dollars"?

10 MR. OBERLANDER: Well, that's -- so  
11 it's in terrorem. It's part of the text of pleading,  
12 but there's no claim. There's claims for various -- I  
13 didn't make a claim for money damages for  
14 distributions he didn't get. She said I did. I  
15 didn't. There is no claim saying as a result of X,  
16 when X happened, he should have got a distribution of  
17 Y. That's just not in the complaint.

18 THE COURT: Right. The fact that you  
19 have an extraordinarily vague complaint and you're  
20 seeking to take advantage of it? You have a prayer  
21 for relief including without limited -- limitation  
22 money damages.

23 MR. OBERLANDER: Well, this is a court  
24 of equity. And while I did ask for money damages, I

1 also asked -- pled in the alternative --

2 THE COURT: That isn't what you just  
3 said. You said it was unfair for your adversary to  
4 indicate that one of your beefs was withheld  
5 distributions, even though in the complaint you  
6 specifically say -- you refer to millions of dollars  
7 that your client supposedly didn't get. Then you ask  
8 for money damages.

9 MR. OBERLANDER: But it's pled with  
10 absolute -- the pleadings, the pleadings -- and she  
11 didn't object to failure to -- I don't see any motion  
12 to dismiss for failure to state a cause of action.

13 THE COURT: It's not the point. You  
14 just said that your complaint was mischaracterized by  
15 the -- indicating that somehow it encompassed a claim  
16 for lack of receiving distributions or something like  
17 that.

18 MR. OBERLANDER: A claim for  
19 distributions due and not paid pursuant to a limited  
20 liability company agreement would be a direct cause of  
21 action for breach of the limited liability company  
22 agreement. And I don't have such a claim in there.

23 What I claimed in there --

24 THE COURT: I'm sure that's helpful



1 for counsel to know.

2 MR. OBERLANDER: But I didn't claim  
3 for it.

4 THE COURT: Okay.

5 MR. OBERLANDER: All right?

6 THE COURT: I would have thought when  
7 you complained that you lost -- your client didn't  
8 access to millions of dollars and sought money damages  
9 and was saying that he --

10 MR. OBERLANDER: I understand that as  
11 a matter of notice pleading that one could assume that  
12 that's the beef; but, in fact, no -- no facts are  
13 alleged in there, really, that took place after 2005.  
14 That complaint is limited to facts that occurred in  
15 2005 other than for background it explains that yes,  
16 later on, he would wind up being cheated of millions.

17 But, in fact, the amount of damages  
18 based on the theory of fraudulent inducement or  
19 restitution or whatever you want -- the amount of  
20 damages that complaint would provide, if it went into  
21 trial and went into judgment, the measure of damages  
22 that the complaint would allow would be what -- for  
23 example, under one theory, what is it which, had he  
24 been given the interest that he couldn't have been

1 given because the Class A companies had no right to  
2 give it to him, what would he have received. So he  
3 was cheated out of millions of dollars from the Class  
4 A companies because they said "Here. Here's your  
5 stock in Class A companies." They knew darn well that  
6 they had no right to give it to him, that the  
7 conveyance is ineffective; but had it been effective,  
8 he would have had millions of dividends flowing  
9 through the stock.

10 In the LLC context, "Here are your  
11 membership interests in six Class A companies." Two  
12 years later they're ready to pay off; but the answer  
13 is nope, not to him, because they were ineffectually  
14 transferred.

15 So I can say that he was cheated out  
16 of millions of dollars, but it doesn't mean that out  
17 of distributions. It means money -- there are  
18 multiple theories by which he lost money that can be  
19 compensable, none of which run to distributions.

20 But the bigger --

21 THE COURT: Well, that's -- that's  
22 good. I'm glad that you've clarified that for  
23 everybody so that people could know what you were  
24 thinking when you said this.

1 MR. OBERLANDER: Well, I made at least  
2 eight separate attempts to talk to opposing counsel  
3 during the last several months. And it might have  
4 come up had they been willing to talk; but we got  
5 basically "Go away. We don't want to talk to you"  
6 comments from them at all times.

7 When you asked her "Did you ever speak  
8 to him" -- I believe you asked counsel whether or not  
9 they ever spoke with us about the amended complaint.  
10 No, because they wouldn't simply speak with us. Don't  
11 answer phone calls. My colleague there will explain  
12 more, because he made more of the phone calls than I  
13 did. In fact, I only called once yesterday, and I  
14 think everything else was e-mail. I don't want to be  
15 misquoted.

16 But if Your Honor would please look at  
17 paragraph 39 of my complaint, paragraph 39 makes it  
18 very clear that we are saying "There is a class of  
19 companies in which you said" -- "you're giving him  
20 stock and you legally couldn't do it, and you knew  
21 that."

22 Now, it doesn't say it was ineffective  
23 as to all the companies. There are companies for  
24 which the transfers were effective. Those are the

1 ones not in Class A; but specifically alleged in there  
2 in 108 and 110 are that two companies, Whitestone  
3 and -- Whitestone and Spring Street, that it was  
4 effective, and he became a member on November 10th.

5 Now, Mr. Arif filed a sworn affidavit  
6 in support of the opening brief for the motion to  
7 dismiss. And in that affidavit he says that he did  
8 give -- or he caused these companies to give interests  
9 to Kriss, and he said some of the company entities  
10 were formed in Delaware; but other than that, nobody  
11 on this group ever had anything to do with Delaware.

12 So if he's in here stating under oath  
13 that "We formed some company entities in Delaware and,  
14 No. 2, that's all we ever did in Delaware," then it  
15 should be obvious logistically that every company they  
16 formed in Delaware is a company entity. Whitestone  
17 was formed in Delaware, and Spring Street was formed  
18 in Delaware. So as far as we're concerned, they've  
19 now admitted as fact that Spring Street and Whitestone  
20 are company entities.

21 Now, we actually alleged in the  
22 complaint that they're company entities. And in the  
23 answer that they filed two days after their motion to  
24 dismiss so that we couldn't file an amended complaint

1 at the time, which is why it didn't get done with  
2 prior counsel, what happened is that they filed a  
3 motion to dismiss. And then we said "Now, gee, why  
4 did you do that? We're still going to file an amended  
5 complaint." And it may be that there was a lot of  
6 work done for nothing. And he wrote back,  
7 Mr. Willoughby, "Well, no, you can't do that because  
8 under 15(aaa) we filed a responsive pleading."

9 And my counsel at the time wrote back  
10 and said "That's news to us. Please enlighten us why  
11 a motion to dismiss is a responsive pleading."

12 So two days later they filed a  
13 perfunctory -- you talk about perfunctory -- they  
14 filed a perfunctory answer. There's no reason they  
15 filed that answer other than to stop me from being  
16 able to file an amended complaint without leave.

17 But --

18 THE COURT: They filed an answer?

19 MR. OBERLANDER: Yes. They filed an  
20 answer two days after the motion to dismiss. And if  
21 you look at the e-mail trails that are in our reply  
22 brief, you will see that it was specifically done just  
23 to stop me from filing an amended complaint as of  
24 right. They filed a motion to dismiss on May 13th, I

1 think, and then on May 16th filed an answer.

2 But if I may, you know, and standing  
3 on this complaint, I would be perfectly willing to do  
4 the following: I will be -- first of all, in their --  
5 in their reply brief -- I'm sorry.

6 In their reply brief they  
7 affirmatively allege that they did transfer the  
8 interests in all company entities. That's in there.  
9 It specifically says in order to effectuate the  
10 profits' interest in the Bayrock enterprise or  
11 whatever you want to call them, in order to effectuate  
12 them, the limited liability company agreements of all  
13 of the company entities were modified and amended to  
14 incorporate the provisions of Section 4. That's a  
15 paraphrase of three consecutive sentences.

16 Since they allege that all the company  
17 entities were properly modified as to their limited  
18 liability agreements, we stipulate to that. We  
19 withdraw the entire Class A section of the complaint;  
20 and, therefore, we stipulate to their allegation that  
21 all of the limited liability company agreements of all  
22 of the company entities were, indeed, amended. And  
23 every cause of action with which we wish to proceed is  
24 for breach of those limited liability company

1 agreements, absolutely none of which have arbitration  
2 provisions in them. And in their own argument they  
3 say -- in their own opening brief they say that  
4 Section 4, which has -- of the employment agreement,  
5 which has to do with the rights of the membership  
6 interests, that section and no other section was  
7 incorporated into those LLC agreements. We now  
8 stipulate to that and agree that the LLC agreements of  
9 every single company entity were modified on  
10 November 10th to incorporate exactly Section 4 and no  
11 other section.

12 THE COURT: Okay. Thank you, sir.  
13 Tell me about this answer.

14 MS. McCORMICK: We filed an answer in  
15 May, Your Honor.

16 THE COURT: Why didn't you say that  
17 when I asked you about this thing about the amended  
18 complaint?

19 MS. McCORMICK: We understand -- first  
20 of all, it's our understanding, Your Honor, that  
21 filing an answer does not preclude a party from  
22 seeking leave to file an amended complaint. We don't  
23 know why they haven't filed the motion for leave to  
24 file an amended complaint. And that was the nature of

1 my response to Your Honor.

2 THE COURT: So you were just trying to  
3 do it so that they wouldn't necessarily be able to  
4 file a motion with leave as of right?

5 MS. McCORMICK: Right. Your Honor we  
6 wanted to preserve our opportunity to oppose the  
7 motion for leave to file an amended complaint. We  
8 wanted the opportunity to review the complaint and,  
9 based on the same frivolity that they filed their  
10 initial complaint, argue to Your Honor, you know, on  
11 the basis that you can oppose the filing of an amended  
12 complaint.

13 THE COURT: Thank you.

14 MS. McCORMICK: It's our  
15 understanding, Your Honor, that even if you assume  
16 everything that -- that counsel for plaintiff has  
17 stated with respect to what he intended when he  
18 drafted the complaint to be true, even if you assume  
19 all of those things, that you still can't escape the  
20 November 10th contract's arbitration clause, because  
21 the issue of standing is still contested and because  
22 that clause itself governs substantive rights with  
23 respect to any of the company entities it purportedly  
24 vests membership interests in.



1                   And the reason for that is, in the  
2 contract itself, which Your Honor was provided a copy  
3 of in the form of Exhibit A to our opening brief, the  
4 contract states that plaintiff is entitled to certain  
5 advancements immediately and separately and later he  
6 would be vested with membership interests, and any  
7 distributions in the interests in those entities that  
8 he was entitled to would be counted against any  
9 advancement he had received.

10                   So the issue of what money plaintiff  
11 would ultimately be owed in any of those entities  
12 cannot be considered without looking at the  
13 November 10th contract.

14                   And even if it wasn't pled that that  
15 is a breach of action, it's our understanding that  
16 that would factor into any award this Court was to  
17 give Mr. Kriss, if any at all.

18                   It's for that reason that we say that  
19 the arbitration clause cannot be avoided.

20                   THE COURT: Okay. Thank you.

21                   MS. McCORMICK: Thank you, Your Honor.

22                   THE COURT: No.

23                   MR. OBERLANDER: No? I'm sorry?

24                   THE COURT: I ... We're not doing sur

1 replies here today.

2 I have to say, this is an astonishing  
3 circumstance for many reasons. But I'm going to give  
4 you my ruling. Then I'll give you some advice.

5 It may well be at the bottom of this  
6 that some serious wrong has been done to Mr. Kriss. I  
7 have no idea. What I do know is that there are  
8 multiple reasons why this -- the complaint before me  
9 needs to be dismissed. Start with the first reason  
10 that the other side advances, which is the arbitration  
11 clause. A reading of the complaint brings everything  
12 back to the November 10th agreement. The complaint  
13 itself alleges that the company entities are parties  
14 to that agreement. That agreement has a broad  
15 arbitration clause. Rather than grapple with the  
16 governing law, the plaintiffs cited Delaware law,  
17 which is inapplicable. Frankly, the Delaware law that  
18 they cited doesn't help them.

19 After the Willie Gary decision of the  
20 Delaware Supreme Court, it's been very clear that when  
21 parties incorporate the AAA rules, they reverse the  
22 presumption that arbitrability is for the -- for the  
23 Court and it is for the arbitrator. In the McLaughlin  
24 decision reported at 942 A. 2d 616 -- and I believe

1 it's the Carder -- I think it's C-a-r-d-e-r. I think  
2 it's the decision of Vice Chancellor Parsons just  
3 issued within the week -- it's made emphatically clear  
4 that if there's any colorable dispute about  
5 arbitrability in the event of the incorporation of the  
6 AAA rules, that dispute is decided by the arbitrator.  
7 Our Supreme Court made very clear in Willie Gary that  
8 it was adopting the federal majority view, and that is  
9 an efficiency-based view.

10 The point is not that arbitrability  
11 goes only to the arbitrator when there's no dispute  
12 about arbitrability. That's a silly rule. The idea  
13 is, in the event that there's a dispute about  
14 arbitrability, who makes the call. Willie Gary says  
15 when you incorporate the AAA rules, it's the  
16 arbitrator, except in some unusual circumstances.

17 New York is even more powerful, and  
18 that's what matters here. Willie Gary and Delaware,  
19 Parfi, TowerHill, memories of mine, are irrelevant,  
20 irrelevant. The contract at issue here is a New York  
21 law contract, specifically New York law without regard  
22 to choice of law. The issue of arbitrability is then  
23 one of New York law.

24 The New York cases are clear. They

1 adopt the federal majority standard. When you pick  
2 AAA, arbitrability is for the arbitrator. Here, you  
3 have a broad arbitration clause which in court --  
4 keeping with the New York authority, which was cited  
5 in the defendants' briefs and cited accurately -- if  
6 you have a broad arbitration clause -- and this is a  
7 broad arbitration clause -- and you incorporate the  
8 AAA rules, there's clear and unmistakable evidence  
9 that arbitrability is for the arbitrator.

10           There is some quibbles about  
11 arbitrability made by the plaintiffs. One of them  
12 relates to a clause which does have some -- some color  
13 to the argument, which is this idea about who is --  
14 who has to arbitrate. They have an argument about how  
15 it's read. There's another reasonable way to read it,  
16 however. And that's the point. Which is if -- there  
17 may be certain nonsignatories you don't have to  
18 arbitrate against, but there are doctrines in law,  
19 well-recognized in New York and federal law, in which  
20 signatories are bound to arbitrate against  
21 nonsignatories.

22           The key issue -- and it is the central  
23 issue -- I don't make that call. The arbitrator does.  
24 And if you don't like what the arbitrator says, then

1 you appeal under the FAA.

2           What we clearly have is a signatory to  
3 a broad arbitration provision who is seeking --  
4 frankly, there's no excuse for evading the clause as  
5 to the company entities or the parties that you  
6 concede are signatories, none. None pled.

7           Clearly also on the -- if you want to  
8 get into the merits of stuff, arbitrability, but it  
9 goes to the colorability -- what I'll say is the clear  
10 colorable claim that there's -- that all these claims  
11 are arbitrable. The complaint itself links everything  
12 to the agreement. Mr. Kriss was supposed to provide  
13 certain services under the agreement. In exchange he  
14 got certain rights, rights in these LLCs, which were  
15 denied to him.

16           Despite counsel's -- counsel may want  
17 to say that there were certain things given; for  
18 example, that he got his interests in certain of the  
19 LLCs. Well, his pleading, the pleading is  
20 emphatically clear that Mr. Kriss was denied his  
21 rights under these agreements on a continuing basis.  
22 And it is alleged that the defendants never intended  
23 to honor the contract rights, such that it is alleged  
24 that they breached the contracts, they breached the

1 November 10th contract, and there's even an implied  
2 covenant claim under those contracts. It's also made  
3 plain that the contract rights are intertwined with  
4 the receipt rights. He was supposed to get money in  
5 certain phases and other sorts of things. It's a  
6 complicated arrangement.

7           There's also an evident reason why you  
8 use an arbitration clause with respect to a  
9 multiplicity of entities incorporated or domiciled, as  
10 the case may be, since they're not necessarily  
11 corporations, in different jurisdictions. So that  
12 everybody could come together, which is why Mr. Kriss  
13 alleges that the company entities are, in fact,  
14 parties to the agreement. People could read it  
15 otherwise, but his allegation is that they are parties  
16 to the agreement. And his contractual promise, if he  
17 had a dispute about it or relating to his agreement,  
18 that he would arbitrate that.

19           All of which is -- in terms of getting  
20 to the merits of substantive arbitrability, I'm not  
21 making a call on that, because it is chosen by the  
22 parties that the arbitrator does it.

23           Alternatively, there's another basis  
24 to dismiss it. This complaint does not plead any

1 viable basis for jurisdiction over the nonresident  
2 defendants. To the extent that there are some  
3 Delaware entities involved, they preexisted in the  
4 complaint, they preexisted the contract. All that  
5 Mr. Kriss says is that among the company entities were  
6 certain Delaware entities, and he was supposed to get  
7 interest in those. Well, among the many of the  
8 entities were Florida entities. He was supposed to  
9 get entities in -- he was supposed to get interest in  
10 them. Those entities preexisted this contract. They  
11 weren't formed. And this complaint doesn't plead  
12 anything about later events. I'll get to some of the,  
13 you know, musings about what might be in an amended  
14 complaint some day; but this complaint pleads none,  
15 nothing.

16 Also, what it doesn't do is identify  
17 really anything except ~~it says that Mrs.~~ -- you know,  
18 Mrs. ... is it Sharif? Arif was in cahoots, the  
19 accountant was in cahoots, the lawyer was in cahoots.  
20 Doesn't tie anything to any act in Delaware.

21 The thing that was used was the  
22 long-arm statute. I'm extremely well-versed in it.  
23 I'm happy -- I contributed to the jurisprudence to  
24 this state on many times about 3104 and the agency

1 theory and how it works in concert. You have to have  
2 an act in Delaware. None -- and it has to be a  
3 substantial act in furtherance of conspiracy. Nothing  
4 like that is pled.

5 And, in fact, I think constitutionally  
6 here, the exercise of jurisdiction is highly suspect.  
7 Usually when someone tries to invoke the conspiracy  
8 theory of jurisdiction, it's because there's been an  
9 act, formation of a Delaware entity or something in a  
10 transaction where Delaware law is the focus of what's  
11 going on.

12 What's astonishing here is the  
13 invocation of this Court's forum -- the forum of this  
14 state in a case that's so redolent of the Gotham  
15 state. Sorry. This is New York, New York, New York.  
16 And you read in the complaint Mr. Kriss, is he a  
17 Delawarean? No. He resides in New York. In fact,  
18 his address under the contract is 75th Street.  
19 Bayrock Group, the key central entity, New York  
20 limited liability company with its principal place of  
21 business in New York. Mr. Arif, identified as a  
22 Turkish national residing in New York. Sater, a  
23 resident of New York. Schwarz, he's in New Jersey, I  
24 suspect the part of New Jersey closer to New York than



1 to Delaware, because what? He's an attorney licensed  
2 in New York and represents Bayrock. Dogan &  
3 Associates, law firm, principal office, New York.  
4 Dogan, attorney licensed to practice in New York.  
5 Salomon, New York professional corporation. Alex  
6 Salomon, CPA, New York. Bencivenga, CPA, New York.  
7 Mrs. Sater -- Sater, Arif's -- is the wife of Sater.  
8 I suppose she lives with her husband in New York.

9 If you look at the company entities,  
10 their principal places of business, even the Florida  
11 and Delaware entities, the principal place, a business  
12 of all of them is -- where it's identified is New  
13 York. The contractual choice of law is New York.

14 So this contract is all about New  
15 York. All of the rights that go forward are linked  
16 into the contract. And I don't know how it would give  
17 anybody a reasonable basis, if I were in New York  
18 entering into a New York law contract as to the fact  
19 that there was some interest given in preexisting  
20 Florida and Delaware entities, how I would know that I  
21 would be hauled in to court on this complaint. I  
22 don't believe it's -- it's constitutionally fair  
23 notice, and there's no proper statutory basis for  
24 service.

1           Given that, these are clearly  
2   indispensable parties. One of the reasons why, again,  
3   people do dispute resolution clauses like arbitration  
4   clauses, when you have people in different places, is  
5   to bring them altogether. There are Florida law  
6   entities here. There are entity -- there are people  
7   who live exclusively in New York.

8           I also say the complaint is wholly  
9   devoid of specific evidence of involvement of these  
10   people. Basically just throwing professionals into  
11   the mix by saying there is one contract -- there is  
12   one paragraph that I guess gets a little bit more  
13   specific. There's some -- "November ... 2005 ..."  
14   communications between Issuers and their counsel and  
15   such other persons and ... Salomon ... in which they  
16   [were] warned of the absence of such authority"; but  
17   they "[weren't] known to Kriss at that time."

18           That's about it. Most of the stuff is  
19   very vague, and it certainly doesn't -- if you -- if  
20   you have a fraud standard under Rule 9 and you want to  
21   use the agency theory of jurisdiction, there's nothing  
22   linking these people to any formative activity.

23           So arbitration under New York law,  
24   established New York law in this context is for the

1 arbitrator. Alternatively, there's no personal  
2 jurisdiction pled for the nonresident defendants,  
3 either, as a matter of statutory law or constitutional  
4 due process. And in the absence -- and -- and there  
5 are also -- this Court also, therefore, would not be  
6 able to have indispensable parties.

7                   Now, let's talk about going forward.  
8 I am going to dismiss this without prejudice through  
9 the institution of a complaint in New York if the  
10 arbitrator determines that there are claims that  
11 aren't arbitrable. It is with prejudice as to any  
12 filing in this Court.

13                   I make that judgment -- I -- I don't  
14 necessarily applaud what the defendants did with  
15 respect to filing an answer, but it did not preclude  
16 the plaintiffs from seeking to amend. And the  
17 plaintiffs, if they wish to amend, should have  
18 amended. There's a sprawling, complicated,  
19 difficult-to-follow recitation in an answering brief  
20 of some new theory. I don't believe it's actually  
21 that distinct from the old theory. I think the old  
22 theory was "We basically told this guy he would get  
23 interest in these things." The contract spelled out  
24 what those interests were and how it worked with his

1 draw and other kinds of stuff. And they never really  
2 intended to honor it. And certainly when things went  
3 well, they didn't.

4 And then there's some example in this  
5 new thing of how -- you know, the point is that some  
6 of the entities may have actually given him a  
7 membership interest. I don't know. It's hard to tell  
8 whether anybody got any certificates or anything  
9 noticing an interest or anything from what's pled. I  
10 mean, it's not -- "pled" is the wrong word. Not  
11 "pled"; put in a brief.

12 Why you put in an amended complaint  
13 and why AAA is the way it is, so that you can take  
14 your shot. If you don't like the first shot you did  
15 when they compiled their motion to dismiss, they give  
16 you -- in their brief they give you what their  
17 concerns are. You have the chance to obviate, you  
18 know, those concerns and to address them by bringing  
19 forth a new pleading. You don't get the chance to say  
20 in your brief what a pleading might look like.

21 Honestly, counsel sitting there  
22 telling me that the other side was supposed to  
23 interpolate what he meant by his pursuit of monetary  
24 damages, what he meant by his accusation that

1 obligations owed to Mr. Kriss allegedly under the  
2 November 10th agreement, that -- remember, under the  
3 November 10th agreement -- and this is why the  
4 arbitrability point is colorable -- those -- that  
5 contract said you get certain rights in entities and  
6 entities would do certain things to give Mr. Kriss  
7 rights. Well, how anyone's supposed to know, when the  
8 complaint refers to -- refers to millions of dollars  
9 that he was not given and seeks monetary damages that  
10 somehow in this first complaint it wasn't dealing with  
11 distributions he was denied; only some other category?  
12 Who's supposed to know that? Most plaintiffs would  
13 stand up and say "Of course it encompassed all the  
14 elements of denial." Now it's "Oh, no. We were  
15 waiting for later to bring that on."

16 This kind of guessing game is not  
17 going to be useful to Mr. Kriss going on or to any  
18 tribunal trying to make sense of this. And you have  
19 your shot to bring an amended complaint. You didn't  
20 use it. I could dismiss it with prejudice entirely in  
21 some ways, but I'm -- the condition is going to be,  
22 you can take your shot in New York if you're going to  
23 bring another case back in court, but not here.

24 And I will also say in terms of --

1 this forum non conveniens is not easy to establish in  
2 Delaware; but if there's -- this is the kind of case  
3 where I believe our Supreme Court would be highly  
4 sensitive to inclination of this Court to grant a  
5 motion to dismiss for lack of proper forum.

6                   Why do I say that? Well, what -- why  
7 we usually give credence to plaintiffs is because our  
8 state has some real nexus to what's going on. Our law  
9 is really at stake, for example, in the business  
10 context. That is not what is going on here.

11                   The root of the wrong pled is that  
12 Mr. Kriss was contractually promised interest in a --  
13 in a real estate empire that operated through multiple  
14 entities, and then from the get-go the intention of  
15 the people who lured him in to give his services was  
16 to not honor that promise. The holding company,  
17 ultimate holding company is a New York company. The  
18 core contract is a New York law contract. Mr. Kriss  
19 is a New Yorker. The people he dealt with were New  
20 Yorkers. He dealt with them in New York. The fact  
21 that some of the subs were in Delaware really doesn't  
22 drive the analysis.

23                   They are also in Florida. We have  
24 blue crabs. They do that stone crab thing. I don't

1 really understand it. New Yorkers do oysters. And --  
2 but the point is, Delaware doesn't have much to do  
3 with this.

4                   And then I hear that in the  
5 unspecified amended complaint there's going to be a  
6 holy host of others joining us. Well, there's one  
7 state where it's very obvious the parties centered  
8 their activity, where all the defendants -- there's  
9 not one defendant in here, if it's not arbitrable, who  
10 can't be subject to service in New York, not one.  
11 From what's pled, all the Delaware entities and all  
12 the Florida entities had their principal place of  
13 business in New York. The accountants practice in New  
14 York. The lawyer practices in New York. The wife's  
15 in New York.

16                   The law at issue is going to be New  
17 York. The fraud law is New York. The contract law,  
18 the tort law, it's all New York. Entity -- what we're  
19 going to do is say a subsidiary -- some subsidiary  
20 denied Mr. Kriss rights? That's not even the theory;  
21 right? The theory is that these were subs to shells  
22 of the holding company, right, and that the dude who  
23 controlled the holding company, Arif, made all the  
24 decisions. That's the theory.

1           The holding company is a New York  
2 company. The contract that gave Mr. Kriss rights in  
3 any of these entities is a, by its express terms, a  
4 New York contract.

5           So I want you all to work on  
6 scrivening the thing. You need to take your shot in  
7 arbitration. And if you -- if it doesn't go in New  
8 York -- arbitration, you can file in New York; but  
9 this case is going to be dismissed in total, because  
10 the reasoning for it applies, frankly, to the  
11 defendant who has not moved. And I'm sorry if there  
12 were misunderstandings with counsel. I don't know  
13 what that's about, I really don't. I don't understand  
14 how anybody reasonably could read the rules of this  
15 Court or the procedural context that this is in, even  
16 given the filing of an answer, and not know that if  
17 you wish to bring on an amended complaint, you do it.

18           But one of the things here is, there's  
19 absolutely no explanation for why the arbitration  
20 clause doesn't apply against Mr. Arif, why it doesn't  
21 apply against the company entities as to the core  
22 issue pled in this complaint, which is clearly a  
23 breach of contract action. Also, all the other  
24 things, clearly there's a colorable argument that



1 they're related and swept in by the arbitration  
2 clause.

3           So with respect to the signatory  
4 versus signatory issues, there's absolutely no  
5 explanation of why those are not in arbitration. And  
6 so I really don't get why, you know, we got to where  
7 we are. But I'm not, frankly, doing Mr. Kriss any  
8 favors. He's pled substantial claims on the merits.  
9 If this is real, there's some -- and I have confidence  
10 the New York courts or the arbitrator will be  
11 sensitive to them.

12           But there are choices in life you  
13 make about where, you know, things are filed. And you  
14 have to respect that. And that's what I'm saying.  
15 This action -- or in New York, if I were keeping this  
16 action, this action would be immediately stayed until  
17 the arbitration is completed, even if there was  
18 nonarbitrable claims. Why? It's pretty obvious, that  
19 the core issue here of whether there was a breach of  
20 the -- of the 2005 agreement, whether that was  
21 fraudulently induced, whether there was anything, is  
22 central and ought to be determined first and that  
23 there's a risk of inconsistent judgments. Most -- a  
24 lot of the individuals brought here are essentially

1 aiding and abetting the primary things.

2 I won't even comment on -- I don't  
3 believe -- nobody attacked this. I also don't believe  
4 that the Arizona or Delaware securities laws apply  
5 every time a share of stock or an interest in a  
6 Delaware or an Arizona entity is sold. It would be  
7 astonish -- I mean, we could, you know -- Eliot  
8 Spitzer could look like a piker in comparison to our  
9 Attorney General, then. I had actually thought -- you  
10 talk about sales of securities within the borders of  
11 states when you're talking about blue sky laws, you  
12 know, because essentially every time a Delaware -- you  
13 know, General Motors stock was sold anywhere, you  
14 could, you know -- maybe that's the case and our blue  
15 sky laws apply. I just hadn't heard that before. I  
16 would think New York, right --

17 MR. OBERLANDER: We don't have any.

18 THE COURT: Well ... you don't have  
19 any. You don't have any securities laws? I mean ...

20 MR. OBERLANDER: Not for private  
21 rights of action.

22 THE COURT: Okay. But it just seems  
23 really odd.

24 And so I probably said too much. But

1 I want to -- I respect the fact that there are serious  
2 concerns here by -- that Mr. Kriss has. I think,  
3 honestly, take -- take these words to heart. And I  
4 think if you do, you can be getting on with the merits  
5 in arbitration of pursuing your claims or certainly  
6 have the fight about arbitrability and then see what  
7 comes out of that.

8 But in any event, what ought to come  
9 out of it is that this case ought to proceed either --  
10 as to the signatories, it seems pretty clear the  
11 arbitrator is going to make you go at least forward  
12 with some of the claims in arbitration or you're going  
13 to have to renounce those claims in some binding way.  
14 And then with respect to the rest, it all happened in  
15 New York. And I don't see any reason why it makes any  
16 sense to be here, honestly, given that -- it would be  
17 ~~one thing if this was~~ -- Delaware law was the focus  
18 and was critical and where all the entities were.  
19 It's quite to the contrary. There's one place -- and  
20 I love that place. I'm a big New York -- fan of New  
21 York. And so, you know, it's -- it's a great -- it's  
22 a great state.

23 And so get -- confirm -- confer with  
24 each other. Get in a simple order. I think the one

1 thing that will have to be nuanced is how you do the  
2 interaction of the arbitration, because it really --  
3 you ought to be going to arbitration. It could be  
4 just as simple, again, without prejudice to filing in  
5 New York. You may have to go -- if they file in New  
6 York and they go around the arbitrator again, you may  
7 have to get another ruling or something like that.  
8 But I think what I would encourage is that you all  
9 talk to each other. Come up with an order and move on  
10 and -- because you're clearly going to move on and  
11 have the fight somewhere. And I'm assuming that  
12 that's what Mr. Kriss most wants is to get his remedy,  
13 if he's entitled to one.

14 So I say please accept everything I  
15 said in that spirit, because it's really meant in a  
16 constructive spirit for all. I'd rather you  
17 concentrate your resources on the central battle  
18 rather than on where you're going to have it.

19 Thank you all.

20 MR. STAMOULIS: Your Honor, just one  
21 question with regard to your ruling. Does it apply to  
22 the books and records action that we filed yesterday  
23 with regard to Mr. Kriss seeking access to books and  
24 records on Spring Street and Whitestone, the two

1 Delaware companies? I just -- I don't want to be  
2 pursuing an action in Delaware --

3 THE COURT: You filed a complaint  
4 yesterday?

5 MR. STAMOULIS: Yes, Your Honor.  
6 We -- we had served -- we -- we discussed going  
7 forward with a books and records action.  
8 Mr. Oberlander mentioned it during his presentation.  
9 We served a demand on the Bayrock company for books  
10 and records. They responded to the demand by saying  
11 our purpose was improper and pretextual.

12 And -- and, Your Honor --

13 THE COURT: What I would do if I were  
14 you, is, I would withdraw that complaint. I'm not  
15 going to sit from the seat of my pants when I never  
16 heard about that before.

17 What I will tell you is, I think if  
18 you look at the law, once you put it in, once you put  
19 it in play, which is by a complaint, you can't use  
20 books and records, then, as discovery. And by  
21 discovery, what I mean is buttressing your claim. You  
22 chose to sue. If you think you have enough to sue  
23 either in arbitration or whatever, then you should go  
24 do it. And you have done it. And the fact that you

1 filed your complaint while this litigation is pending,  
2 I mean, again, I'm not dismissing it from the seat of  
3 my pants.

4                   What I would suggest is, I would  
5 withdraw it, if I were you. Rethink your strategy.  
6 What -- you know, I don't -- I'm not being paid to be  
7 your lawyer. But I would file the strongest darn  
8 arbitration complaint I could. And I would seek the  
9 best arbitrator I could under the AAA and an  
10 experienced person and I'd get to fighting for the  
11 remedy. But that's what you have to decide.  
12 Having -- I had no idea -- I'm sure this got assigned  
13 to me as a related case; right?

14                   MR. STAMOULIS: Yes, Your Honor.

15                   THE COURT: Yeah. And it's related in  
16 the sense that you wanted books and records so you  
17 could have discovery, you could have information that  
18 you could use in this case.

19                   MR. OBERLANDER: No. No. I'm sorry.

20                   MR. STAMOULIS: My New York counsel  
21 will answer that.

22                   MR. OBERLANDER: Just for the  
23 record -- and I have the utmost respect for books and  
24 records proceedings -- Mr. Kriss filed a books and

1 records action for several proper purposes. I will  
2 not argue that investigation of mismanagement, which  
3 you will see in that complaint, the books and records  
4 complaint, mind you, that cites activities in 2007 and  
5 2005. You could fairly argue, Your Honor, and say  
6 that that could certainly look like we were attempting  
7 to use it for discovery. So I'm not going to argue  
8 that that could look like that. Certainly that wasn't  
9 our intent, but it could certainly look like.

10 But we have other proper purposes  
11 stated. There is a very significant proper purpose in  
12 the books and records which has nothing to do -- it  
13 could be inconceivable to link it to that complaint,  
14 which is that since they themselves have said in every  
15 document they filed here that they gave him profits'  
16 interests in company entities that made him a tax  
17 partner, those company entities have transacted, to  
18 our knowledge, \$87 million worth of sales, loans,  
19 financings, and distributions; and he has never  
20 received one K-1, nor will they provide any tax  
21 returns or any other information. Tax returns are a  
22 statutory item under 18-305. It's specifically  
23 written requesting them, with very exquisitely  
24 detailed explanation of why he needs them line by line

1 as a matter of partnership tax law, why he needs to  
2 know why there are problems, inconsistent position  
3 reports that have to be filed. And all of that,  
4 obviously, relates to valuation.

5 So since they have already rejected  
6 the books and records demand the same day we filed the  
7 action claiming our action was pretextual, there isn't  
8 one single thing anywhere in that complaint or in  
9 anything we talked about to file later that relates to  
10 taxes. His tax returns are absolutely -- not his;  
11 partnership tax returns are clearly contemplated by  
12 statute as absolutely a right to him. And in US v  
13 Somerville or is it Somerville v US, in one of the  
14 interim --

15 THE COURT: I told you --

16 MR. OBERLANDER: Okay.

17 THE COURT: -- I wasn't getting rid of  
18 this. You've heard what I have to say. You make your  
19 own judgment and I'll address it. If you want to  
20 pursue a 220 action, you pursue it, and I'll handle it  
21 in the ordinary course. Just be mindful of the  
22 distinctions between 220 and Rule 26.

23 I'd also be mindful of -- I don't know  
24 how much money in the world the parties have. But,



1 you know, sometimes you concentrate -- I mean,  
2 sometimes wise people concentrate their resources.

3 But -- I appreciate you bringing it  
4 up, but I have no idea. I don't monitor by the minute  
5 what cases come in. So I'm focused on this particular  
6 civil action.

7 So try to get me an implementing order  
8 by next Tuesday at the latest. Thank you.

9 (Court adjourned at 11:03 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 55 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 18th day of September 2009.

/s/ Neith D. Ecker

-----  
Official Court Reporter-  
of the Chancery Court  
State of Delaware

Certificate Number: 113-PS  
Expiration: Permanent



Joshua Bernstein

Page 1

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

- - - - - X

JOSHUA BERNSTEIN,

Plaintiff,

- against -

Index No:

02579/09

BAYROCK GROUP, LLC,

Defendant.

- - - - - X

11 Martine Avenue

White Plains, New York

March 8, 2010

10:04 a.m.

EXAMINATION BEFORE TRIAL OF

JOSHUA BERNSTEIN, the Plaintiff herein,  
taken by an attorney for the Defendant,  
pursuant to Notice and Order, held at the  
above place and time before Apryl S.  
Montero, a Stenotype Reporter and Notary  
Public within and for the State of New  
York.

\* \* \* \*

Joshua Bernstein

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1 A. Most do, yes.  
2 Q. Did you ever take that hard  
3 drive, download any of it for any reason  
4 whatsoever?

5 MR. OBERLANDER: Compound  
6 question. Objection.

7 Q. Did you ever take out that  
8 hard drive physically?

9 A. No.

10 Q. Did you ever download  
11 portions of the hard drive?

12 A. I believe so.

13 Q. Could you explain that when,  
14 how, what did you download, for what  
15 purpose?

16 A. At the direction of Felix  
17 Satter I downloaded regularly files from  
18 that hard drive and the server.

19 Q. What drives, what files?  
20 Particular files or groups of files?

21 A. Groups, various.

22 Q. What directions did Felix  
23 give you as far as --

24 A. To keep them offsite, an

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1 archival copy as much of the server as I  
2 could. This was on or about December 17,  
3 2007, I think well before, when he was  
4 afraid that the firm was going to screw  
5 him, that he wouldn't be able, you know,  
6 to make his profits of his half of the  
7 ownership of the firm.

8 Q. And did you follow his  
9 instructions?

10 A. Yes.

11 Q. So you downloaded files from  
12 what computers or what servers?

13 A. There was only one active  
14 server within the firm.

15 Q. What files?

16 A. Various e-mail files.

17 Q. Of whose?

18 A. Of various users.

19 Q. Okay. I'm going to ask you  
20 about that in a couple of minutes. I  
21 want to finish with this exhibit.

22 Please turn to page 11. Did  
23 you receive an e-mail from Felix Satter  
24 on September 8th saying, "Where are you?"

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1 It's September 8, 2008, on page 11?

2 A. Yes.

3 Q. And on page 12 did you  
4 receive another one from him on  
5 September 4th -- these may be -- I tried  
6 to keep them chronological, but I see  
7 that September 4th comes after September  
8 8th. "Where are you?"

9 A. Yes.

10 Q. So both on September 4th and  
11 September 8th he, Felix, asked you where  
12 you were?

13 A. Sure, which he would  
14 regularly send to the employees who  
15 worked for him, including Dan Ridloff,  
16 and we'd correspond about where we were  
17 at the time.

18 Q. And on September 4th on  
19 page 13 he says, "Where are you? Answer  
20 now."

21 Did you receive that?

22 A. Yes.

23 Q. Does that indicate to you  
24 that he was impatient to hear from you?

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1 A. Yes, because I was sleeping  
2 at this time.

3 Q. You were in Europe?

4 A. Yes.

5 Q. Let's go back to the --

6 THE WITNESS: Can I take a  
7 break, a bathroom break.

8 MR. DOMB: Sure.

9 (Whereupon, a short recess  
10 was taken.)

11 MR. DOMB: Let's mark the  
12 next exhibit. I think it's a  
13 multipage exhibit which I've  
14 numbered 1 through 24.

15 MR. OBERLANDER: Off the  
16 record.

17 (Whereupon, a discussion was  
18 held off the record.)

19 (Whereupon, Defendant's  
20 Exhibit S, a 24-page document, was  
21 marked for identification as of  
22 this date.)

23 Q. Exhibit S.

24 A. Yes.

50 (Pages 194 to 197)

Joshua Bernstein

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1 Q. That is a composite exhibit  
2 which consists of e-mails and maybe  
3 e-mail attachments.

4 Did you sign the e-quote  
5 with Greenhouse, that's the first page,  
6 Greenhouse IT.

7 A. I believe that's my  
8 signature.

9 Q. And that's July of '07;  
10 there's a date right under your  
11 signature?

12 A. Yes.

13 Q. And what were you  
14 contracting to get from Greenhouse IT?

15 A. Software installation.

16 Q. What kind of software?

17 A. Spector CNE and configure  
18 Trend anti-spyware.

19 Q. Can you explain in layman's  
20 terms what that software does?

21 A. That's a monitoring  
22 software.

23 Q. What does it enable you to  
24 do?

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1 A. It enables the administrator  
2 to monitor activities on computers.

3 Q. Does it enable the  
4 administrator to see what people are  
5 seeing on their monitors and at their  
6 workstation computers?

7 A. I believe that's a function  
8 of it.

9 Q. Well, does that apply to,  
10 let's say, web pages that they may be  
11 looking at on the Internet?

12 A. I believe anything that's on  
13 the screen.

14 Q. So it includes e-mails, for  
15 example?

16 A. I believe anything that's on  
17 the screen.

18 Q. And if you put up a contract  
19 that would also be capable of being  
20 monitored?

21 A. Anything on the screen.

22 Q. And who was the  
23 administrator that could monitor this?

24 A. Felix Satter.

1 Q. Was he the only one?

2 A. No.

3 Q. Who else could?

4 A. I had the ability to as  
5 well.

6 Q. You had the ability. Did  
7 you actually monitor what people looked  
8 at?

9 A. When asked by Felix, yes.

10 Q. Did you monitor when, on  
11 your own, when not asked by Felix?

12 A. Not that I recall.

13 Q. But you had the ability to do  
14 that?

15 A. Yes, given my administrative  
16 rights, yes.

17 Q. When you signed up for this  
18 software on line one it says on five  
19 workstation, do you see that, the first  
20 page?

21 A. Yes.

22 Q. And then if you look through  
23 these e-mails you'll see that at some  
24 point additional workstations were added;

1 correct?

2 A. I don't see that.

3 Q. Well, let's look at page 8,  
4 at the bottom you e-mailed --

5 Simon Binder was from  
6 Greenhouse; correct?

7 A. Yes.

8 Q. You e-mailed Simon Binder,  
9 and you said, "Here are five other  
10 users -- "

11 And you gave initials;  
12 correct?

13 A. Yes.

14 Q. Who is D. R.?

15 A. Dan Ridloff.

16 Q. J. K.?

17 A. Jody Kriss.

18 Q. J. S.?

19 A. Julius Schwarz.

20 Q. R. L.?

21 A. Ray Lee.

22 Q. And K. S.?

23 A. (No response.)

24 MR. FEINBERG: K. S.?

51 (Pages 198 to 201)

Joshua Bernstein

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1 A. I don't recall who K. S.  
 2 was.  
 3 Q. As a result of --  
 4 Was this software, in fact,  
 5 installed, at least on these monitors?  
 6 A. I don't recall whether these  
 7 additional ones were ever completed.  
 8 Q. Well, I think if you look  
 9 through, we're going to look through and  
 10 be able to determine that.  
 11 Look on page 11. There's a  
 12 list of computer users for this software;  
 13 correct?  
 14 A. Yes.  
 15 Q. And I count ten here; is  
 16 that right?  
 17 A. Yes.  
 18 Q. And were all these installed  
 19 in those ten?  
 20 A. I believe so.  
 21 Q. Look on page 13.  
 22 Greenhouse, is writing, someone from  
 23 Greenhouse writes to you and says that,  
 24 "I think that in order to get J. S.

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1 working we need to reboot his laptop."  
 2 Do you see that?  
 3 A. Yes.  
 4 Q. And then he suggests that  
 5 the computer has to be shut down, and if  
 6 it's not shut down you have to schedule a  
 7 reboot to occur overnight, which will  
 8 force any work he leaves open to close.  
 9 Do you see that?  
 10 A. I do.  
 11 Q. Do you recall whether this  
 12 was done in order to get Julius Schwarz'  
 13 computers under this software?  
 14 A. I don't recall.  
 15 Q. Well, look on page 22,  
 16 please. On October 9th, middle of the  
 17 page, you e-mailed someone at this  
 18 company and say, "Please let me know  
 19 about user J. S."  
 20 Do you see that?  
 21 A. Yes.  
 22 Q. That's Julius Schwarz, isn't  
 23 it?  
 24 A. Yes.

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1 Q. And then the answer is to  
 2 you, "I founded activity for user J. S.  
 3 from 9/6/07 to 10/9/07.  
 4 Do you see that?  
 5 A. Yes.  
 6 Q. And this e-mail was written  
 7 on October 9, '07, 10/9/07; correct?  
 8 A. Right.  
 9 Q. So this person had said that  
 10 the software was, in fact, operating on  
 11 Julius Schwarz' computer, at least from  
 12 September 6th to October 9th of '07?  
 13 A. That's what this e-mail  
 14 says.  
 15 Q. And none of these e-mails  
 16 are copied to Felix, Felix Satter, are  
 17 they?  
 18 A. Not unless they are blind  
 19 carbon copied, no.  
 20 Q. It's just between you and  
 21 Greenhouse, isn't it?  
 22 MR. OBERLANDER: Objection.  
 23 It's calling for a conclusion. He  
 24 couldn't possibly know. No one

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1 could know because a blind copy  
 2 won't show up.  
 3 MR. FEINBERG: It's --  
 4 BY MR. DOMB:  
 5 Q. Apart from blind copies, no  
 6 one else from Bayrock is copied; isn't  
 7 that true?  
 8 A. Not on these e-mails.  
 9 Q. And from your recollection  
 10 did you copy Felix Satter on these  
 11 e-mails?  
 12 A. Not on these, although Felix  
 13 Satter sent an e-mail to Greenhouse  
 14 authorizing this.  
 15 Q. How do you know that?  
 16 A. Because he told me he did.  
 17 Q. Did you see it?  
 18 A. I did.  
 19 Q. Did you tell Julius Schwarz  
 20 about this?  
 21 A. No.  
 22 Q. You never copied him on any  
 23 of this?  
 24 A. No.

Joshua Bernstein

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1 Q. In fact, it was your  
2 intention not to tell Julius Schwartz;  
3 correct?  
4 A. It was Felix's intention to  
5 not tell Julius Schwarz.  
6 Q. And it was your intention  
7 also?  
8 A. To follow my instructions,  
9 yes.  
10 Q. And you were aware that  
11 Julius Schwarz was company counsel who is  
12 an attorney for the company; correct?  
13 A. I was aware, but I believe  
14 at this time he was acting --  
15 Yes.  
16 Q. And he was superior to you  
17 in the company or senior to you, was he  
18 not?  
19 A. Yes, he was.  
20 Q. And you had the ability to  
21 look at everything that he looked at on  
22 his computer?  
23 A. I believe I had the ability.  
24 Q. And, in fact, you did look

1 A. I don't recall do that.  
2 Q. Is it possible that you did  
3 and you just don't recall right now?  
4 A. It's possible. I don't  
5 recall doing it.  
6 Q. Do you think it was proper  
7 for somebody without Julius Schwarz's  
8 knowledge to monitor what he was looking  
9 in the computer?  
10 A. Absolutely. Felix Satter  
11 owned the firm, so he told me to do  
12 things and I was listening to the boss.  
13 Q. And did he tell you this  
14 verbally?  
15 A. Yes, and then he wrote an  
16 e-mail confirming the software should be  
17 put on.  
18 Q. To your knowledge, did you  
19 produce a copy of that e-mail in this  
20 litigation?  
21 A. Perhaps, but I can double  
22 check.  
23 Q. Did he copy you on that  
24 e-mail?

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1 at what, from time to time at what was on  
2 his computer?  
3 A. I don't believe I did.  
4 Q. You don't believe you did?  
5 Are you a hundred percent certain of  
6 that?  
7 A. Not a hundred percent. This  
8 is three years ago, two years ago.  
9 Q. So you may have looked at it  
10 and you just don't remember right now?  
11 A. I don't remember.  
12 Q. Did you ever copy things --  
13 Did you have the ability to  
14 copy, not just look, but copy things on a  
15 screen?  
16 A. They were generated in the  
17 log filed. They were automatically  
18 copied.  
19 Q. So you could go to the log  
20 and pull up whatever the person had  
21 looked at and get a copy of it or forward  
22 it to some other place electronically?  
23 A. Yes.  
24 Q. Do you recall doing that?

1 A. I don't recall.  
2 Q. If he did then that should  
3 be in your inbox?  
4 A. It should.  
5 Q. Around what time did Felix  
6 send the e-mail that you say he sent to  
7 Greenhouse?  
8 (Whereupon, the Witness  
9 conferred with his attorney.)  
10 A. Please repeat the question.  
11 Q. Around what time did Felix  
12 send Greenhouse the e-mail-authorizing  
13 the e-mail that you say he sent?  
14 A. I don't remember the time.  
15 Before this date.  
16 Q. On or around July 2007?  
17 A. Yes.  
18 Q. To your knowledge did Felix  
19 ever monitor the, what these various  
20 computer users were looking at on their  
21 computers?  
22 A. I believe so.  
23 Q. What's your basis for  
24 believing so?

53 (Pages 206 to 209)



Joshua Bernstein

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1 A. Because he had the  
2 administrative rights and the ability to  
3 do. That's what it was installed for,  
4 his use.  
5 Q. Did he ever tell you that he  
6 did this?  
7 A. Yes.  
8 Q. Did he ever tell you what  
9 things he looked at?  
10 A. No.  
11 Q. Did he ever tell you  
12 anything else about what he looked at or  
13 why or when? Do you recall any specifics  
14 about what he told you?  
15 A. No.  
16 MR. OBERLANDER: Which?  
17 THE WITNESS: ABC.  
18 MR. OBERLANDER: All of  
19 them?  
20 THE WITNESS: Yes.  
21 MR. OBERLANDER: Wouldn't  
22 that be a massive amount of  
23 storage; right?  
24 THE WITNESS: I'll tell you

1 Do you see that?  
2 A. Yes.  
3 Q. And then it goes on to say,  
4 "We collected the requested information  
5 and e-mailed it to Josh as per his  
6 request."  
7 Do you see that?  
8 A. Yes.  
9 Q. What was the purpose in  
10 requesting all admin passwords?  
11 A. I was asked to keep a record  
12 of everything, because when Greenhouse  
13 was brought in they had changed  
14 passwords, and we didn't have them on  
15 site. So we didn't know the passwords.  
16 Q. Did you need the passwords  
17 in order to monitor the individual  
18 computers?  
19 A. No.  
20 Q. So what, this was just --  
21 Why did you need it then?  
22 A. Recordkeeping. We didn't  
23 have access I think -- maybe a day before  
24 this we had some problem. We couldn't

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1 later. I'm good.  
2 MR. DOMB: You gentleman are  
3 speaking on the record. Do you  
4 want to share with us what you're  
5 talking about?  
6 MR. FEINBERG: No. There's  
7 no question posed, and we can talk  
8 whatever we want to talk about.  
9 Pose your question and we'll  
10 stop talking.  
11 BY MR. DOMB:  
12 Q. Please look at page 11 of  
13 this exhibit, Exhibit S.  
14 (Whereupon, the Witness  
15 conferred with his attorney.)  
16 Q. I'm sorry, 18. If I said 11  
17 I meant 18.  
18 A. Okay.  
19 Q. There's an e-mail here on  
20 September, in September 2007 from  
21 Greenhouse. It says, "Josh Bernstein  
22 would like a list of all admin passwords  
23 along with the IP address of the servers  
24 and the firewall."

1 access the server, and Greenhouse wasn't  
2 able to fix it and I needed to go into  
3 it, but I didn't have the password.  
4 Q. So sometime in middle, in  
5 the second half of 2007, based on you and  
6 Felix Satter, you installed spyware on an  
7 a number of individuals' computers at  
8 Bayrock; correct?  
9 A. I'm not sure that's the  
10 appropriate term of art.  
11 Q. Well, it was a spyware  
12 software. You described it yourself.  
13 A. No, I did not.  
14 Q. Well, okay. You installed  
15 spyware that enabled the administrator to  
16 look at the contents of the screens of  
17 all of the users that are mentioned here?  
18 I think we went over this --  
19 MR. FEINBERG: Object to  
20 just the form, your  
21 characterization. It is what it  
22 is. Just take out the word --  
23 A. Here's what's happening.  
24 You're misspeaking.

54 (Pages 210 to 213)

Joshua Bernstein

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1 There's two parts to what  
2 you're looking at in the document. The  
3 first part is a piece of software that  
4 enabled the administrator to view.

5 The second part is Trend,  
6 it's anti-spyware, which is the second  
7 piece of software, which is specific.

8 Q. I'm focusing on the first  
9 piece of software, the Spector CNE.

10 A. CNE, yes.

11 Q. And that enables the  
12 administrator to look at the various  
13 computer screens --

14 A. Yes, yes.

15 Q. -- as we just discussed.

16 A. Correct.

17 Q. And how long was this  
18 software operating at Bayrock, to your  
19 recollection?

20 A. I believe from inception  
21 until --

22 Q. Until the time you left  
23 Bayrock?

24 A. I don't know the end date of

1 Q. Looking at Exhibit T, and I  
2 notice you're leafing through it. Maybe  
3 we can go a little quicker on this one.

4 Do you remember ordering  
5 some services and equipment from 1&1  
6 Internet Team in or around July of 2008?

7 A. Sounds about right.

8 Q. What were you ordering?

9 A. Service for website hosting  
10 and e-mail.

11 Q. For different domains?

12 A. Yes.

13 Q. Which domains?

14 A. MiraxUK.com and  
15 Bayrockinc.com and SwissCIB.com.

16 Q. Were those companies related  
17 to Bayrock?

18 A. Yes.

19 Q. Mirax was the one that you  
20 mentioned before that was a joint venture  
21 with Russian entities?

22 A. Yes.

23 Q. What's Bayrockinc?

24 A. That was a, I believe a

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1 it.

2 Q. But as far as you know when  
3 you left Bayrock it was still  
4 operational?

5 A. As far as I know.

6 MR. DOMB: Please mark  
7 Exhibit T, another composite of  
8 e-mails and et cetera, numbered 1  
9 through 21.

10 (Whereupon, Defendant's  
11 Exhibit T, a 21-page document, was  
12 marked for identification as of  
13 this date.)

14 MR. OBERLANDER: There's no  
15 question now; correct?

16 MR. DOMB: No, but there  
17 soon will be.

18 MR. OBERLANDER: I  
19 understand that, but I want to  
20 check something.

21 1&1 is the web hosting  
22 company, right?

23 THE WITNESS: (Indicating.)

24 BY MR. DOMB:

1 Delaware company that then Felix Satter  
2 took over to transfer his ownership  
3 shares of Bayrock into or out of Bayrock  
4 Group, LLC.

5 Q. Was that while he was still  
6 working at Bayrock or after he left?

7 A. He was still employed.

8 Q. And what about Swiss CIB?  
9 What is that?

10 A. That was the name under  
11 which the company that Felix was trying  
12 to start, Swiss Capital Investment  
13 Banking, CIB.

14 Q. So these were websites that  
15 each of these companies were setting up?

16 A. Yes.

17 Q. And you did this under whose  
18 instruction?

19 A. Felix Satter.

20 Q. Was anyone else from Bayrock  
21 involved in these entities other than  
22 Felix, to your knowledge?

23 A. Yes.

24 Q. Who?

55 (Pages 214 to 217)

Joshua Bernstein

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1 A. Alina Gorbachev, Yuliya  
2 Gashapova, Stan Tolstinov, Paul McKewan  
3 or Paul Mozlitz, I don't know which name  
4 is legal, and at various times Julius  
5 Schwarz.

6 MR. FEINBERG: I'm sorry,  
7 what was the question that was  
8 posed?

9 MR. DOMB: Who else at  
10 Bayrock was involved in these  
11 entities.

12 Give me a minute and I'll  
13 get these in order.

14 THE WITNESS: Do you mind if  
15 I grab bottle of water?

16 (Whereupon, a brief recess  
17 was taken.)

18 Q. When your employment at  
19 Bayrock ended, did you take with you or  
20 retain any Bayrock documents?

21 A. Yes.

22 Q. What documents?

23 A. Various documents.  
24 Thousands of different e-mails and such.

1 Q. Any particular topics of  
2 e-mails that you chose to print? How did  
3 you choose which e-mails to print and  
4 keep?

5 A. I don't recall. Usually  
6 expenses.

7 Q. Is it fair to say if there's  
8 anything important you were more than  
9 likely to keep it than if it was wasn't  
10 so important?

11 A. That's fair to say.

12 Q. Did you ever, to your  
13 knowledge during your employment, write  
14 an e-mail to someone at Bayrock  
15 confirming a verbal discussion that you  
16 had had about your compensation or bonus  
17 or benefits?

18 A. Yes, but only parts of it.

19 Q. I mean, we looked at one  
20 before where you wrote to Julius Schwarz,  
21 remember, and I questioned you about  
22 that? Let's just get a number.

23 That was Exhibit G, your  
24 e-mail to Julius Schwarz.

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1 Q. Well, did you keep them in  
2 paper form or electronic form?

3 A. Both.

4 Q. What did you keep in paper?

5 A. Hundreds of documents,  
6 various things that were printed out.

7 Q. Do you still have them?

8 A. I believe so.

9 Q. And in general, you say  
10 hundreds of documents?

11 A. Mainly e-mails.

12 Q. So they were printouts of  
13 e-mails?

14 A. Mainly.

15 Q. So you printed out e-mails,  
16 hundreds of them, and kept them?

17 A. Yes.

18 Q. And you printed them while  
19 you were employed at Bayrock?

20 A. Yes, and after.

21 Q. Where did you keep them?

22 A. In my files.

23 Q. At home?

24 A. Yes.

1 A. Oh, yes, the one where Felix  
2 threatened me if I didn't write the  
3 e-mail.

4 Q. Apart from that, do you  
5 recall ever writing to someone at  
6 Bayrock, for example writing to Felix and  
7 saying, "Felix, I want to confirm our  
8 conversation where you promised to do, to  
9 pay me X or Y."

10 Did you write any such  
11 e-mails?

12 A. You provided one here where  
13 I said that you confirm our agreement  
14 from yesterday, in exhibit --

15 Q. You mean the one about your  
16 trip, your cancelled trip?

17 A. Yeah, and severance,  
18 correct.

19 Q. Okay. Other than what we've  
20 seen today, do you recall, specifically,  
21 recall any other times when you wrote --

22 For example, did you write  
23 an e-mail to Felix saying, "I want to  
24 confirm that you promised to pay me

56 (Pages 218 to 221)

Joshua Bernstein

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1 \$200,000, not \$100,000, in connection  
 2 with the Loehmann's deal?"  
 3 A. No.  
 4 Q. Did you write an e-mail to  
 5 Tevfik Arif saying that you expected to  
 6 be paid the equivalent of a broker, a  
 7 broker's fee on the Loehmann's deal,  
 8 which would be about million dollars?  
 9 A. No. Tevfik Arif did not  
 10 have e-mail.  
 11 Q. Did you write such an e-mail  
 12 to anyone else at the company to let them  
 13 know what deal that you say he had  
 14 promised you?  
 15 A. No. They were all verbal.  
 16 Q. Now, getting back, you said  
 17 you took paper files and you also took  
 18 some electronic files with you when you  
 19 left Bayrock?  
 20 A. Yes.  
 21 Q. What other electronic files?  
 22 A. Backup files of my e-mail  
 23 and anything else that was available on  
 24 my computer.

1 items.  
 2 Q. Containing the same items?  
 3 A. I believe so.  
 4 Q. And what was in it  
 5 generally --  
 6 Did you go through a similar  
 7 process where you selected what to put in  
 8 there, or did you just download large  
 9 numbers of files indiscriminantly?  
 10 A. Indiscriminantly.  
 11 Q. What period of time?  
 12 A. From approximately  
 13 December 2007 to the end of my  
 14 employment.  
 15 Q. Well, were you able to  
 16 download things through September 16th or  
 17 through some date earlier when you were  
 18 in the office?  
 19 A. Through September 16th.  
 20 Q. So we discussed before that  
 21 for some reason unknown to me and unknown  
 22 to Bayrock, four months of e-mails from  
 23 your sent box couldn't be found at  
 24 Bayrock.

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Page 225

1 Q. Well, did you have a backup  
 2 file of all your e-mails, incoming and  
 3 out-going?  
 4 A. No.  
 5 Q. How did you --  
 6 What is in that backup  
 7 file -- well, let me withdraw that.  
 8 Whatever you took in a  
 9 backup file do you still have it, from  
 10 Bayrock?  
 11 A. Yes.  
 12 Q. So it hasn't changed, you  
 13 haven't deleted things from it?  
 14 A. I don't believe so.  
 15 Q. So you still have that --  
 16 Is it in a thumb drive?  
 17 What kind of a --  
 18 A. Portable hard drive, thumb  
 19 drive.  
 20 Q. And you still have it in the  
 21 same condition containing the same items  
 22 that it had before you left Bayrock?  
 23 A. Hard to answer the question,  
 24 the condition or containing the same

1 Are they in your backup  
 2 drives that you've maintained all this  
 3 time?  
 4 A. I don't believe so.  
 5 Q. Why not?  
 6 A. Because I don't believe they  
 7 are there.  
 8 Q. But you, it was the  
 9 intention when you left Bayrock to  
 10 download all these files and put them  
 11 into this portable hard drive; correct?  
 12 A. Correct.  
 13 Q. So you didn't get them  
 14 either? Just like Bayrock doesn't have  
 15 them you don't have them either?  
 16 A. I don't believe so.  
 17 Q. Do you have any explanation  
 18 for where they are or what happened to  
 19 them?  
 20 A. Yes. Bayrock deleted them.  
 21 Q. Well, the period --  
 22 That's your belief. Do you  
 23 have any --  
 24 A. That's my belief.

57 (Pages 222 to 225)

Joshua Bernstein

<p style="text-align: right;">Page 226</p> <p>1 Q. Do you have any hard 2 evidence or hard basis for saying that 3 other than your belief? 4 A. Not at this point. 5 Q. Do you, the period -- I 6 think we went over this -- the period of 7 missing sent e-mails was roughly May 8 through August or September of 2008? 9 A. I don't have it offhand. 10 Q. Approximately. I won't hold 11 you. Give or take a month; is that 12 right? 13 A. I will give that, yeah. 14 Q. So during that period did 15 you download any of your files or all of 16 your files to this portable hard drive? 17 A. During that period I did 18 download files. 19 THE WITNESS: Can I use the 20 bathroom real quick. 21 (Whereupon, a short recess 22 was taken.) 23 MR. DOMB: What's the last 24 question please.</p>	<p style="text-align: right;">Page 228</p> <p>1 A. I don't know. I don't keep 2 count. 3 Q. Do you have the more than 4 one external drive containing Bayrock 5 materials? 6 A. I don't believe so. 7 Q. So you have one? 8 A. Yes. 9 Q. Does that, what do you call 10 that, an external drive? Is that a good 11 term for you to use? 12 A. It works. 13 Q. Does that drive contain 14 items other than Bayrock-related items? 15 A. I believe so. 16 Q. Is there a way for you to 17 separate out the Bayrock from the 18 non-Bayrock? 19 A. Should be. 20 Q. How would you do it? 21 A. Manually. 22 Q. One by one? 23 A. Absolutely. 24 Q. How many different e-mails</p>
<p style="text-align: right;">Page 227</p> <p>1 (Whereupon, the requested 2 question was read back by the 3 reporter.) 4 Q. And you said, I believe that 5 you keep these in a portable hard drive? 6 A. What are these? 7 Q. The electronic files from 8 Bayrock that you took with you? 9 A. I did. 10 Q. And you still have it? 11 A. I don't have that drive, 12 that specific drive, no. 13 Q. You transferred it to a 14 different drive? 15 A. Yes. 16 Q. So the contents are still 17 there? 18 A. Yes. 19 Q. Does the drive have things 20 on it other than Bayrock-related items? 21 A. Does the current drive or 22 the -- 23 Q. Well, how many do you now 24 have?</p>	<p style="text-align: right;">Page 229</p> <p>1 or files are in it? 2 A. I don't know. 3 Q. When you produced documents 4 in this case you did not produce all the 5 Bayrock-related items in that portable 6 hard drive, did you? 7 A. It's all relevant documents. 8 Q. And you made the decision as 9 to what is relevant or not? 10 A. (No response.) 11 Q. Who made that decision? 12 MR. FEINBERG: You served a 13 documented request. He responded 14 to the document request. 15 MR. DOMB: I'm asking a 16 simple question. 17 Q. Who made the decision as to 18 what to produce from that drive? Was it 19 you? 20 A. Between my counsel and I. 21 Q. So did you, are there some 22 Bayrock-related materials that you did 23 not produce? 24 A. Yes.</p>

58 (Pages 226 to 229)



Joshua Bernstein

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1 MR. DOMB: Do you have any  
2 objection to producing all  
3 Bayrock-related materials that you  
4 have not yet produced from that  
5 portable hard drive.

6 MR. FEINBERG: I guess if  
7 you make a request specifically  
8 we'll take it under advisement  
9 whether we have a problem with it  
10 or not.

11 MR. DOMB: From my review of  
12 the document request I thought it  
13 was very broad and it was already  
14 requested.

15 But, for the record, we do  
16 request that you produce promptly  
17 all Bayrock-related items from  
18 that drive.

19 And as you know there's been  
20 a dispute. We also request the  
21 ability for an independent  
22 computer expert to review that and  
23 make sure that that happens. So  
24 we do make that request, and

1 produce some and not others, and  
2 we are entitled to see all of  
3 them. So we make that request.

4 MR. FEINBERG: And we'll  
5 verify to see whether the request  
6 that you made in terms of the  
7 document response has been  
8 complied with.

9 And there may be documents  
10 other than those which were  
11 responsive to your request, which  
12 is what I assume you're asking  
13 for.

14 In other words, just so  
15 we're clear, you have a document  
16 request --

17 MR. DOMB: I'm making two  
18 requests. If we requested it and  
19 it hasn't been produced, obviously  
20 we want it.

21 MR. FEINBERG: Obviously.

22 MR. DOMB: And if you did  
23 not read our request broadly  
24 enough, we now request all

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1 please mark that.

2 MR. OBERLANDER: That's  
3 bilateral, isn't it? I think we  
4 made the same request. I'm just  
5 saying that it can be coordinated.

6 MR. FEINBERG: You made the  
7 request, because you have missing  
8 documents that we were going to  
9 access to try to find out why or  
10 in what manner they were deleted,  
11 okay. We've never indicated that  
12 we have files that have been  
13 deleted or other materials that  
14 require --

15 You don't get access  
16 automatically to someone's  
17 computer just because you want to  
18 see what they have. You made your  
19 request and we'll take it under  
20 advisement.

21 MR. DOMB: The record says  
22 what it says. There are  
23 Bayrock-related materials that  
24 your side made a decision not to

1 Bayrock-related items in that  
2 portable hard drive, whether you  
3 deem them to be within our  
4 document request, or whether  
5 anyone deems them to be --

6 MR. FEINBERG: That's a new  
7 request, and we'll take that under  
8 advisement.

9 BY MR. DOMB:

10 Q. Have you now described  
11 fairly all of the Bayrock-related items  
12 that you took with you after you left  
13 Bayrock, that is, paper and electronic  
14 files?

15 A. All of what I -- there was a  
16 Blackberry that I sent back to Bayrock,  
17 that I retained or sent back.

18 Q. Okay. On the Blackberry,  
19 you had a Blackberry that was issued to  
20 you or provided to you by Bayrock?

21 A. Correct.

22 Q. And after you left Bayrock  
23 you sent it back?

24 A. Yes.

59 (Pages 230 to 233)







**From:** fred55@aol.com [mailto:fred55@aol.com]  
**Sent:** Wednesday, May 12, 2010 12:33 PM  
**To:** Kriss, Ronald (Sh-Mia); Kriss, Ronald (Sh-Mia)  
**Subject:** Fwd: complaint, sdny, salomon, weinrich, & salomon & co.

Ron --

I recommend you forward this to Julius with the comment from me that there are three alternatives here:

- (a) I file publicly today.
- (b) I file under seal today.
- (c) He arrange a tolling agreement with EVERY defendant but nixon peabody.

I don't care how many people he has to get on the phone and how fast he has to work. He had years to give back the money and now it's over. He can get Brian Halberg to help him.

I believe it's possible to get this in under seal if Bayrock joins in a joint motion in part 1 to seal the complaint pending a redaction agreement with the assigned judge. but there are never any guarantees.

Thanks,

FMO

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CHAMBERS OF THE  
HON. NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF NEW YORK  
PHONE # 212-805-0194  
FAX #: 212-805-7927

## FAX COVER SHEET

DATE: 5/13/10Frederick M. Oberlander, Esq. 212.202.7624TO: Kelly A. Moore, Esq. / Brian A. Herman, Esq. 212.309.6001FAX#: David L. Lewis, Esq. 212.964.4506

FROM: Judge Buchwald's chambers

PAGES TO FOLLOW: 3RE: LO CV 3959 (NRB)Kriss + Ejekam, et al. v. Bayrock Group LLC, et al.

## MESSAGE:

Please see enclosed Order, per  
today's teleconference with Judge  
Buchwald. Thanks, Mike O'Neill

CONFIDENTIALITY NOTE: This facsimile is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this facsimile or the information herein by anyone other than the intended recipient is prohibited. If you have received this facsimile in error, please notify us immediately by telephone or return the facsimile by mail.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
JODY KRISS and MICHAEL EJEKAM, et al.,

Plaintiffs,

- against -

O R D E R

10 CV 3959 (NRB)

BAYROCK GROUP LLC et al.,

Defendants.  
-----X

NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

**WHEREAS**, the complaint in this case attaches and otherwise makes reference to documents which were sealed in a federal criminal case brought in the Eastern District of New York; and

**WHEREAS**, plaintiffs' counsel has disseminated the complaint and the exhibits thereto to certain named defendants and others, it is hereby

**ORDERED** that no further dissemination of the complaint and exhibits thereto or the sealed information contained therein be made pending further order of the Court; and it is further


**ORDERED** that plaintiffs' counsel immediately contact all persons who have received a copy of the complaint and inform them of this Court's order that there be no further dissemination of the complaint and exhibits thereto or the sealed information contained therein pending further order of the Court.

05/13/2010 17:51 FAX 212 805 7927

Judge Buchwald

003/004

Dated: New York, New York  
May 13, 2010

  
NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been sent on this date to the following:

Frederick M. Oberlander, Esq.  
Law Office of Frederick M. Oberlander  
28 Sycamore Lane, Box 1870  
Montauk, NY 11954  
Fax: 212.202.7624

Kelly A. Moore, Esq.  
Brian A. Herman, Esq.  
Morgan, Lewis & Bockius LLP  
101 Park Avenue  
New York, NY 10178  
Fax: 212.309.6001

David L. Lewis, Esq.  
Lewis & Fiore  
225 Broadway, Suite 3300  
New York, NY 10007  
Fax: 212.964.4506



05/14/2010 14:52 FAX 212 805 7927

Judge Buchwald

001/004

CHAMBERS OF THE  
HON. NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF NEW YORK  
PHONE # 212-805-0194  
FAX #: 212-805-7927

FAX COVER SHEET

DATE: 5/14/10

Frederick M. Oberlander, Esq. 212.202.7624

TO: Kelly A. Moore, Esq. / Brian A. Herman, Esq. 212.309.6001

FAX#: David L. Lewis, Esq. 212.964.4506

FROM: Judge Buchwald's chambers

PAGES TO FOLLOW: 3

RE: 12 CV 3959 (NRB)

Kriss + Ejekam, et al. v. Bayrock Group LLC, et al.

MESSAGE:

Please see enclosed Order, per  
today's teleconference with Judge  
Buchwald. Thanks, Mike O'Neill

CONFIDENTIALITY NOTE: This facsimile is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this facsimile or the information herein by anyone other than the intended recipient is prohibited. If you have received this facsimile in error, please notify us immediately by telephone or return the facsimile by mail.



05/14/2010 14:52 FAX 212 805 7927

Judge Buchwald

002/004

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
JODY KRISS and MICHAEL EJEKAM, directly  
and derivatively on behalf of BAYROCK  
GROUP LLC, BAYROCK SPRING STREET LLC, and  
BAYROCK WHITESTONE LLC,

**ORDER**

10 CV 3959 (NRB)

Plaintiffs,

- against -

BAYROCK GROUP LLC, TEVFIK ARIF, JULIUS  
SCHWARZ, FELIX SATTER, BRIAN HALBERG,  
SALVATORE LAURIA, ALEX SALOMON, JERRY  
WEINRICH, SALOMON & COMPANY PC, AKERMAN  
SETERFITT LLP, BRUCE STACHENFELD, DAVID  
GRANIN, NIXON PEABODY LLP, ADAM GILBERT,  
ROBERTS & HOLLAND LLP, ELLIOT PISEM,  
MICHAEL SAMUEL, MEL DOGAN, BAYROCK SPRING  
STREET LLC, JOHN DOES 1-100, BAYROCK  
WHITESTONE LLC, BAYROCK CAMELBACK LLC,  
BAYROCK MERRIMAC LLC, BAYROCK GROUP INC,  
and NATIONAL UNION FIRE INSURANCE CO. OF  
PITTSBURGH, PA,

Defendants,

- and -

BAROCK GROUP LLC, BAYROCK SPRING STREET  
LLC, and BAYROCK WHITESTONE LLC,

Nominal Defendants  
(Derivative Plaintiffs).

-----X  
NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

**WHEREAS**, the complaint in this case attaches and otherwise  
makes reference to documents which were sealed in a federal  
criminal case brought in the Eastern District of New York; it is  
hereby

05/14/2010 14:52 FAX 212 805 7927

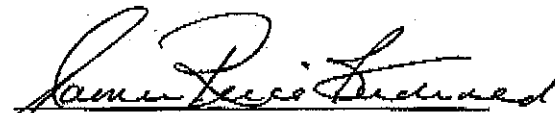
Judge Buchwald

003/004

ORDERED that the original complaint be sealed pending further order of the Court; and it is further

ORDERED that a redacted version of the original complaint, redacting any sealed documents or references to sealed documents, be filed with the Clerk of the Court by May 19, 2010, to be followed by an electronic (.pdf) version of the redacted complaint.

Dated: New York, New York  
May 14, 2010

  
NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

05/14/2010 14:52 FAX 212 805 7927

Judge Buchwald

004/004

Copies of the foregoing Order have been sent on this date to the following:

Frederick M. Oberlander, Esq.  
Law Office of Frederick M. Oberlander  
28 Sycamore Lane, Box 1870  
Montauk, NY 11954  
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